









THE PROPLE OF THE STATE OF ILLINOIS ex rel. JACOB TWARDZIK et al., (Relators)

Appellants,

VS.

FRANCIS X. SWIETLIK et al., (Respondents)

Appellees.

APPEAL FROM SUPERIOR COURT OF COCK COUNTY.

289 I.A. 6091

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

I. Relators (originally two, now seven) by their amended and additional petitions, filed an information in the nature of a quo warranto, whereby they seek to question the title of the respondents (thirty-four in number), who claim to be and are acting as officers, directors and commissioners of the Polish National Alliance of North America, a fraternal insurance corporation organized under the laws of Illinois December 7, 1380, under the name of the United Polish National Benevolent Society. March 30, 1896, the Alliance qualified under the act concerning the organization of fraternal beneficiary societies, and in force June 22, 1893, and amended by the act approved June 21, 1895, in force July 1, 1895. (See Session Laws of 1893, page 130; Laws of 1895, pages 178-80; Ill. State Bar Stats. 1935, chap. 73, pages 1921-26, secs. 1 to 14.)

October 14, 1935, an order was entered in the Superior court granting leave to the State's Attorney to file an information. January 3, 1936, the order of October 14th was vacated and leave given to file an amended petition, which was filed March 14, 1936. A rule to show cause was entered, which respondents answered. June 23, 1936, the additional petition was filed, and on the same date the court, considering the cause upon the pleadings with exhibits thereto attached, held the same insufficient to warrant the filing of an information, entered an order dismissing the petitions

THE PROPER OF THE STATE OF ILLINOIS EX TOI, JACOB TWARDZIK et al., (Relators)

Appellants,

.BV

PRANCIS X. SWIETLIK et al., (Respondents)

AppellegeA.

APPEAU FROM SUPERIOR COURTY.

289 I.A. 609

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

I. Relators (originally two, now seven) by their amended and indictional petitions, filed an information in the nature of a quo marranto, whereby they seek to question the title of the respondents (thirty-four in number), who claim to be and are acting as officers, directors and commissioners of the Polish National Alliance of North America, a fraternal insurance corporation organized under the laws of Illinois December 7, 1880, under the name of the United Polish National Benevolent Society. March 30, 1896, the Alliance qualified under the act concerning the organization of fraternal beneficiary societies, and in force June 22, 1893, and amended by the act approved June 21, 1895, in force July 1, 1895. (See Session Laws of 1895, page 180; Laws of 1895, pages 173-80; Ill. State Bar Stats. 1935, cnap. 73, pages 1921-26, secr.

Outober 14, 1935, an order was entered in the Superior ourt granting leave to die State's Attorney to file an information. January 5, 1936, the order of October 14th was vacated and leave given to file an amended petition, which was filed warch 14, 1936. A rule to show cause was entered, which respondents answered. Inne 23, 1936, the additional petition was filed, and on the same date the court, considering the cause upon the pleadings with exhibits thereto atteched, held the same insufficient to warrant the hibits thereto atteched, held the same insufficient to warrant the filting of an information, entered an order dismissing the petitions

at the cost of the relators. From that judgment the relators have perfected this appeal.

Respondents claim title by reason of their election at the 27th convention of the Alliance, which was held in Baltimore, Maryland, from September 16, 1935, to September 23, 1935. The charter, constitution and by-laws of the Alliance and the minutes of the proceedings of the convention are all attached as a part of the pleadings. Fourteen of the respondents were elected originally at the convention held last prior to the Baltimore convention at Scranton, Pa., in 1931, and were re-elected at the later convention in Baltimore. Under the by-laws these fourteen hold office until their successors are elected and qualified. The legality of the proceedings of the Scranton convention is not questioned. It is apparent, therefore, that as to these fourteen officials an ouster from their present offices is impossible in these proceedings. However, the relators challenge the right of these with the other respondents.

The pleadings are voluminous. The parties have agreed to reduce their respective contentions from twenty-two to seven, and to these we have given consideration.

charter of the Alliance. They say it provides for "triennial" conventions; that the 27th convention held at Baltimore was a "quadrennial" convention and not a special one, and that the convention was, therefore, illegal and the election held at it void as contrary to the charter. Relators ask us to carefully distinguish between the charter, the certificate of Association and the constitution and by-laws. They say the charter consists of the certificate of association as amended and the statutes covering this subject. Wood v. Mystic Circle, 212 Ill. 532;

Fraternal Tribunes v. Steele, 114 Ill. App. 194, 215 Ill. 190;

at the coat of the relators. From that judgment the relators have parfected this appeal.

Asspondents claim title by reason of their election at the 27th convention of the Alliance, which was held in Baltimore, Maryland, from September 16, 1835, to September 23, 1935. The charter, constitution and by-laws of the Alliance and the minutes of the proceedings of the convention are all attached as a part of the pleadings. Fourteen of the respondents were elected originally at the convention held last prior to the Baltimore convention at Scranton, Pa., in 1931, and were re-elected at the later convention in Baltimore. Under the by-laws these fourteen hold office until their successors are elected and qualified. The legality of the proceedings of the Scranton convention is not questioned. It is apparent, therefore, that as to those fourteen officials an ouster from their present offices is impossible in these proceedings. However, the relators challenge the right of these with the other respondents.

The pleadings are voluminous. The parties have agreed to reduce their respective contentions from twenty-two to seven, and to these we have given consideration.

II. The relators base their first contention upon the charter of the Alliance. They say it provides for "triennial" conventions; that the 27th convention held at Baltimore was a "quadrennial" convention and not a special one, and that the convention was, therefore, illegal and the election held at it void as contrary to the charter. Relators ask us to esrefully distinguish between the charter, the certificate of Association and the constitution and by-laws. They say the charter consists of the certificate of association as amanded and the statutes covering this subject. Wood v. Mystic Circle, 212 III. 532;

Sherry v. WCOF, 166 Ill. Apr. 254. Article 1, section 2 of the constitution provides that the convention of the Alliance "shall meet for deliberation at the time and place fixed by the last preceding convention. " The time and place of the meeting of the Baltimore convention was fixed at the last preceding convention, held at Scranton, Pa. The relators, however, contend that section 2 is inconsistent with the charter and for that reason void. The charter is attached to the pleadings. It appears to have been granted March 30, 1896. At that particular time the Alliance was accustomed to hold "biennial" conventions, The charter by clause 5 grants the supreme power of the order to a central government, composed of ter men "to be elected by the representatives of the members of the respective groups thereof at the 'biennial' session of the Alliance," Clause 7 of the charter, after stating the names of the first ten directors, provides that their successors shall be elected by the representatives of the members of the respective groups thereof "at the 'biennial' session of the Alliance, which is the supreme legislative body of the Alliance.

State at Springfield a certificate to the effect that at the regular "biennial" convention of 1915 a resolution was adopted by which the "Articles of Association" were acended "by energing the time of meetings of the supreme legislative body of the society from 'biennial' to 'triennial' sessions." The resolution was submitted to a referendum vote of the groups and approved and ratified by a vote of more than two-thirds of the subordinate groups and thereupon became effective. This amendment was approved by the Director of Trade and Commerce on July 16, 1917, as attested by the Superintendent of Insurance, and filed with the Secretary of State July 18, 1917. Beginning with 1918 the Alliance held "triennial" conventions up to and including the 26th

ilanet sourlil, sor to achter the or a drawn serious reincidence sand one of heart costs for each must be notheredlies uch ream dad to guideous des 1. de 1 for sein onk " andiserne entreseur nels is Hearmanies. Pv. Eigo malabore, novee in, content h at agution is investible the the course the branch and for the transfer weils. The election is attracted to the place; a, affection of terms of the election of bear granted ward to 1896. At said outsided in the the the georgico citti .accisevente "Election il con 13 accise ten en 190 con recon Torther a of refre and to appear our the officer a semile yo cverument, compact of to hard the increasing in the representatives, "Lineba" and on hearth again, ovidence or will be an dame and to seesing of the Alliance." where 7 o the constem, when an trage The lines of the First ten tirestore, emprises that their suncessing ens 're smod an eru to servicatuosercer and yd beinele od Ilina a s 'to moisses ' industr' but de" los cost assect avilouser Alliance, with is the apprecia lerislate body of the Alliana, "

July 18, 1917, there was liked wise the decretary of the contract at Smingfield a certainlesse to the edition was adopted regular "bleamiel" convention of 1910 a resolution was adopted by which the "Articles of Association" was accessed "by shaping of the supreme logici, the body of the sector of the time of meetings of the supreme logici, the body of the sector of ety from 'bleamint' to 'trienmial' sessions." The resolution of the from 'bleamint' to 'trienmial' sessions." The resolution reas submitted to a referendment was of the cape and appreciate than two-suirss of the superside of more than two-suirss of the subscrales to reveal the the three-court teamint of insurance, as rives it is the start of the third dury 18, 1917, as selected of state of start and the thir the third third the third the third third the third third the third the third the third third the third the third third third third third the third thir

convention, held in Scranton in 1931, with the exception of a special convention held in 1923. This 26th "triennial" convention passed a resolution changing the time for helding the convention from "triennial" to "quadriennial." It was not, however, submitted to the subordinate groups for ratification nor filled with the Secretary of State, the Director of Trade and Commerce or the Superintendent of Insurance. However, we find nothing in the charter which is inconsistent with this action. Nor upon examining the law under which the Alliance was incorporated do we find anything therein inconsistent therewith. Heading the petitions it appears that the point is an afterthought.

The first petition is one part of it describes the convention as triennial, in another part as quadriennial. The Ealtimore convention was duly called. The call was well known to all the members of the Alliance. Relators knew of it. The greater number of them took part in it. No one of them made any protest on this ground. Section 7½ of the statute above cited requires the approval of the Director of Trade and Commerce of changes in the charter, but reasonably interpreted this must be held to refer to matters which are mandatory under the statute. There is no mandatory provision in the charter with reference to the time of holding these conventions. Relators are not now in a position to claim that a convention in which they participated without protest is void. The first contention cannot be sustained.

III. The second contention of the relators is that the election of the respondents is void for the reason that fifteen directors were elected, whereas only thirteen could legally be chosen. The original Articles of Association named ten persons to act as directors and vested in them the government of the Alliance. It provided for the election of their successors by representatives.

.i. rodustrati in ai inima tais inch exercic ti paois

-

ion of tri maint, in the mate of quadraterial, the courts of the courts of the or tri maint. The coltist, in the mate requiremental. The coltist, who call must easily to meet a solution of the coltist, who call must easily to the coltist of the c

ill, when every contributed for male ( m i etc. ), solvetion of the personal terms is vely for the presentation of the personal terms as only reference on the Lee Lag the conference. The ori include Articles of Alexandrian mand and the Lemman was at the city of the Life terms and vested in their city processes to the Life are therefore and vested in their successors by recreases the resembling the contraction of their successors by recreases their sections.

of the group in their "biennial session," which was given supreme legislative power. The number of directors was not expressly limited as provided for in the statutes. If there was a limitation it was only by implication. In 1903 the Articles were amended so as to increase the number of directors to eleven. In 1909, by a like amendment the number was increased to thirteen. In 1915 by like amendment the number was increased to fifteen. The last named amendment, like the preceding amendments, was filed with the Secretary of State, but thus far has not been approved by the Director of Trade and Commerce or by the Superintendent of Insurance. Sec. 74 of the Fraternal Beneficiary Societies Act (see Ill. State Bar Stats. 1935, page 1924) provides that any corporation, association or society organized under the provisions of the act may change its article of association in the manner prescribed by its own rules, but no such change shall be of legal effect until a certificate setting forth finally and definitely the changes proposed shall have been submitted to and approved by the Director of Trade and Commerce and filed in his office. Every corporation, association or society organized, having adopted such change in its articles of association, shall comply with the provision of this section Within 60 It appears that for twenty-four years the Alliance has treated the amendment as in force. It does not appear that any state official has at any time made objection. The Alliance complied with the section in so far as any duty was cast upon it. Three of the relators were candidates for the office of director at the Baltimore convention when 15 directors were choses. Hone of them made any objection on this ground. The point was not raised by the original petition. It was first suggested in the additional petition filed June 23, 1936. Moreover, section 7 of the Fraternal Insurance Beneficiary Act (see Ill. State Lar

of the group is their detected mession, " I term on the shorter lowing active nears. The new term of threatment in a set expressing -usi it to the transfer to the tell to the transfer as faitail tion is use only by its itention. In about we waiteled a secandres as a compassing a graduate of a proposal of a payment. 1909, by a liter - outleast towns one maches was there ever to taiwhere. In 1917 by 111.0 . . or bushe one are bushes the thirtens. The look with with a tell like the percention and a way was Films with the engression to the part to the contract of the infinite proved by all velocity of the object to the end of the distriction of the contract of the cont tendent of incorrect, the. The distance man is good to Sociation and (mos Mil. Shits Car State, 1956, a sea 1804) erovice with the correction, according or receiving or with worms to afolder set ognede yet for out to received but as no Corr on the same and a land of the half to a read the same of the corr. White within other lines a tirms for the angel to ad them symme Timely was definitely be enquery enquery ord ylotinites been gland har the remove the same to respect to the permit have now berting filled in his office. In any corners on, named and on noistr estantes to relative set at or at more interpretarion, backers tion, shell commit with the oracides at this section Without જારા માનવારી દિ. ભાગ માત્ર મામલી સ્થાપના કે જાણ કરતા મામલા છે. માનવાર કે માનવાર કરતા મામલા છે. માનવાર મામલા કે treated the a martinate so in lower, it incessor the market tag error operation wit and anticological or and the Alliance complica with the section in so i'm as any way was ages earn it. taleasts to suitte me got a tableace care estates and to mail bio. The wire commencers is it ment morthermore exemptles out de to the made only objection on this mound. I've point the tat of all the case of the same of the same of the case of the same The alast will seed the wastelleast company the transfer out State. 1935, page 1924) which contains the law applicable to Articles of Association of fraternal corporations, does not limit the number of directors which may be chosen, differing in this respect from many other statutes. For more than 24 years every member of the Alliance seems to have acquiesced in the view that their representatives were entitled to participate in the choice of fifteen directors. Whatever the right of state of ficials might be, we hold these cannot now, under such circumstances, raise this question. People ex rel. First v. Firsten, 240 III.

App. 217; People v. Crowley, 250 III. 292. Moreover, even if permitted to raise the question, we are unable to see how it could affect any of the respondents, except possibly the two directors who received the least number of votes at the election. We hold against this contention.

IV. The third contention of relators is that the convention should have elected seven men and three women directors. whereas eight men and two women were chosen. Also that 26 commissioners should have been elected, whereas only 17 were chosen. It is difficult to understand the theory of the relators in so far as the election of commissioners is concerned. If the convention should have chosen 26 commissioners and only elected 17 of them, this would be no reason for ousting the 17 who were in fact caosen. The fact that the convention did not elect as many commissioners as it ought to have elected would be no reason for removing those who were elected, thus leaving the corporation without any commissioners. Landamus to elect others rather than quo warranto to ouse those chosen would seem to be the appropriate reactly. In this, as well as other objections made under contention three, the relators rely on the provisions of sections 36, 38 and 42 of the by-laws. The official minutes of the Baltimore convention show, however,

At such and the property of the constraint of the second and the second and the second and the second and the constraints, who second all the second and the constraints, who second all the second and the second all the second and the second according to the second and the second according to the second and the second according to the second accor

(

a parties of the series of the estimate for it is not a facilities of the tion enough large of even toyer toyer or even a finance moit -uicage in the and a marking over manage each tan ass. In is persist stoners amonth three beet educate from the control fines are made a with a silent interior to product fundament of finitill with the control of the course of the condition of a notice of the . A. to his terms of the fact that second in him of the encode owned bloods the small be are represented and include the compact of the property of the contract of the co TO STANDARD THE THE STANDARD STANDARD STANDARD AND THE STANDARD with App. To dign on get in you as of filling fore in great of ities it which is a to the first to the common of and read and the took organ are. Leadersus to slook of ore a time and income to the action trone crases, would sent to be the more riche montp. In othe, as will as other of the transment and an interest of the transment of the manual transment of the transment of rely on the groundstone of rections C. . 32 to the groundstone. provided which will be come or only but and he appears halofully and that the convention amended these sections of the by-laws; that the changes were recommended by the Committee on By-laws and adopted by the convention without protest. The amendments countries the provision which provided for the election of seven men and three women directors. This change provided for the election of five men and two women in directorial district A and either a man or woman in directorial districts B, C and D. Two of the relators participated in this election without objection.

Another objection made is that two women commissioners at large were elected, whereas by the third paragraph of section 38 of the by-laws women commissioners were ineligible for this place. The restriction, however, refers to commissioners elected in particular districts, not to commissioners elected as these were to represent the Alliance as a whole. Evidently it was so understood, for the point was not raised by any objection made at the time of the election.

V. The fourth contention of the relators is that the election of the respondents was illegal by reason of the provision in the constitution of the Alliance to the effect that the election should be held on the 4th day of the convention. In this particular instance it was held on the 8th day. We hold this provision of the Constitution is evidently directory rather than mendatory.

People v. Graham, 267 Ill. 426; People v. Miller, 314 Ill. 474.

Notwithstanding such a provision, officers chosen at a later day than that fixed, if there is no other infirmity in their titles, are held to be officers de jure. Beards ey v. Johnson, 121 ... Y.

224; Rashua Fire Ins. Co. v. hoore, \$6... 1. 43; In re: Lenitherm

Co., 113 Atl. 327; In re: Farrell, 200 ... Y. Suppl. 98. In fact, counsel for the relators concede that this fact alone would not invalidate the election, but insist that it should have some weight in the consideration of other points discussed.

that the comman link is surfed these archive of the eyelest too the content too the content and the cities were normaled by the condition of the cities are content at the content of the cities provided for the election of terms and the cities are clearly of the cities and the cities are content to the cities a transfer and the cities are content to the cities a transfer content to the cities a transfer content to the cities are retisted as cities at the content to the cities and the content to the content of the cities are content as the content of the cities are content.

(

amorter objection with the letter was even on the instance as large same attended of organisms as large ware stands of organisms as the braints to see our factoriers we institute for this late are in the instance of the large same are are instance of the contract of the results of the objection and the results of the objection.

civelia, of the remondants was intered by weepen of the speciation cive the cive of the speciation of the remondants was intered by weepen of the cive of the cive

VI. The relators also contend that the Baltimore convention should be considered only as a special convention at which no officer could be elected. This contention is essentially not different from that which we have already considered in connection with the argument that a "triennial rather than a quadrennial" convention should have been called. What has been already said need not be repeated. The contention cannot be sustained.

VII. The sixth and seventh contentions of the relators may be considered together. These are that the convention was unlawfully convened and the election distantally conflucted. Contentions of the relators in brief are that for a year prior to the convention Swietlik and others conspired to gain control of the Alliance. To that end Swietlik "hand-picked" a Credentials Committee for the purpose of seating his adherents, thereby gaining control. The three men chosen by him for this purpose were M. Rozicki, who acted as chairman of the Credentials Committee, M. Lada and K. Domanski. As there were only five members of the Committee these three were able to control it. Relators say. that as soon as the names of this Credentials Committee were published in the official organ of the Alliance, challenges against these three were filed with Sweitlik and the Credentials Committee on the ground that these three men were not delegates from their communes and therefore not eligible to sit on the committee; that a report of a committee of five from "said commune" had been filed with the central executive board and the credentials committee; that these came into the hards of Rozicki, who thereafter destroyed them; that the reports of this committee of live showed that these three men were not entitled to sit as delegates or to be members of the committee because they had not been elected representatives; that seven delegates from commune 38, of which Rezicki was one, were duly elected from that commune,

-Accordent experiminal old form that a neft emphasize act ...

or in the active wave faired as an after formation of finance method as a vifet according to the contract of the or selection of the contract o

the sing sinil and nover to control in the sinil and in

men deficiented that have been beentally to advers frametheries and you -nec . Ardoninac this mitall molderie erd in bonever til beside rit or Thire The a relation of Talia at Stocketor and the emphision to was to format ming of feel days show a series with solve and Alberta to ber one drieting "candedicad" a credentials comthe state of the reasons of seasons, i.i.s. while the real terms, terms are control. The teres will cocaca by this for this but to chore . . ingicki, van notel am daniruam of the credentite to. laced.: . Lada and E. Bonanchi. As there were only five . bore of the Cornittee were were which to control it. Relevens any, test as soon as the name of this aredentials Co. is an area mublished is the cilibial organ of one Allisher, challenges allifacture three were filed with executives in a care or not permit and one Condition on the group | that where three her were not delepoted from fieir communes can satisfie de pligique to alt on the -acc Bins" sort svit to ostatance a le free a sized ; -- with no the burney be no original with the control entire or surjective and er-dentials condition; that these owns into the sends of Merical, wastin no side to darroger and said them to this on this on this an the objections for error was said took to be word awit to Jon bud youl was not decide more than the tree the sed of to sed paled been placted representatives; that seven delegates from us aumoii, of which Rocieni was one, were duly elected from tack convente,

and that they were prevented from taxing their placer is the house by the credentials committee: that getting no relief from the censor and the credentials committee, 38 delegates and 40 additional delegates sought the aid of the supervisory council, the highest judicial tribunal of the Alliance. In response thereto 14 of the 26 commissioners made a written demand on Swietlik to call a meeting of the council for the purpose of disposing of the complaints. He refused to do so. Then 14 members of the supervisory council made a demand on the central executive board to call a special meeting of the council; this was done. Fifteen members of the council met and by a vote of 14 to 1 decided that the credentials committee, as appointed, was null and void; condemned the conduct of the committee as unfair and unlawful; and appointed a new credentials committee, served notice of their acts on the censor, and demanded the books which were in the possession of the Swietlik credentials committee; the committee refused to surrender these books. The supervisory council insisted on bringing the matter to the attention of the delegates at the opening of the convention but were prevented by Swietlik, who induced them to permit his credentials committee to make its report for the purpose of permitting the seating of representatives on List No. 1, which was supposed to contain only the names of unchallenged delegates, Swietlik provising that then the convention came to order he would permit the council to make its report, The credentials committee did not place only unchallenged representatives upon List 1, but included therein 38 members who were not duly elected, and also withheld from the list the names of 28 unchallenged delegates, who were known to be opponents of Swietlin. When members of the council and other delegates undertook to object they were prevented from being heard by swietlik, who drouned them out by the use of a "loud-speaker and microphone," ordered the

and the they were overweath from this this bleen in the cones by the esecontines count too; that getting up reitel from the censor was the eraderatias constituent 30 darantites which the relief are thinks of the first out of the court of the section of the first o

.

1

ni. Host faciolat raib men of bed educional to resista te arcte là of the 80 confesioners make a written de mae on briefilm to and the miscossic to see the ord to thom a one to missom a fico complaints, we refused to to an increase of the surveyvisory council anders who and on the condition and adverse bear to respect to a specific the council to the country of agen books at I of the colors of the tem Library and to tradition the or devicing co. Litter, as appointed, the mil will will being in the transcript all the property of the second to the second beauty ask of the counce, and detailed the horizon take, tops in the pedain no and jerval and alcomento dilabimi and to deisocrace refusel to carraler tass conts, the succrisity a and isade gete aleb and to mobimodal and as insthe add the hird no badaic the opining of the convention and rere grown bed by intertier, who -on est some es costado elettrico et simo est meno est meno hombiai positioning or and positive the endian, to provide the continuous to the continuous on that ho, I, which was supposed to contain only the added of the condition, and the contraction of the contraction of the contraction pair . From 2 st outer of Alamens and filtre bitter of refus of same - Just good formand or and plate to be for 51% and in me additionate the event of separation is alread behaling that it seems never sovis SE to mean a say this out of this will be and the being to the

undiadicound solessies, who sere impose to be considered of 'wisting \$00 to the next to bid as . I had be lighted but le credited work they very mayout direa toing tear of dwielik, one dreamen them. and harafric ", emergorate. The weathers-is of " a he a sent of due marshal to remove from the hall everyone whose name did not appear on List 1: swore in the delegates, and then proceeded to pass upon the eligibility of delegates whose names appeared on Lists Nos. 2 and 3, whose rights were challenged. Relators say the factions were about even in number, and Swietlik secured a majority through the 38 delegates mentioned, who voted for him. the majorities ranging from 2 to 27 votes. In this manner it is averred Swietlik obtained control of the convention and elected himself and others respondents. It is said that the credentials committee withheld from List 1 the names of 28 known opponents of Swietlik without any grounds, refused to place on List Lo. 1 40 representatives against whom there were no challenges, and permitted 16 additional adherents of Swietlik to vote who were not legally elected representatives, and after the convention the chairman destroyed all the records pertaining to this matter. 165 names were reported on List No. 1 against whom challenges had been filed by the committee. The credentials committee in its report stated that it had received challenges against 203 representatives. There were 520 representatives at the convention. List No. 1 therefore should have contained only 317 names. The committee falsely reported 467 names on List ho. 1. Uhallenged representatives, it is said, were not permitted to present their evidence. Contrary to the by-laws, the consittee sent out to 100 representatives known to be opposed to Swietlik telegrams and letters telling them not to come to the convention until the challenges against them had been disposed of by the convention. When some of these did appear they were not even liven a hearing. The credentials committee, it is said, gave out identification cards to those whom it had illegally decided were entitled to seats in the convention. Only persons holding these identification

to be able ones on one recogness that all and the ornear on list it avent in the delegates, and their arms del up an hermester once a popular arconation to got I thatto odd moon come Lists see. If the (, vac) s rights were conditioned. fractions apthe factions were about even in number, and bulletil secured a malarity through the 33 date; the sentiamed, who would the thin the sufferilies rowing from C to WY rotes, in this water is is porord Twistlik obtains do no to low most to the will be tropied picischera in in. s bisa el si . enhangura arecce bas lissabi to plantapara amona 88 to same a ont I told more bloodily ostilmos 1 .o. said no soule of hearter, rebauty was sucidia Militer . the add the service at this is the contract and it is the all the in lagally olected resuggest title and after the convention the . nest ad sids of gainlaire alreper ed ille beyonde b mornicio 165 norse were reported on the to. 1 applied who served 185 been filed by the consistee. The credentials consisted in its -ere, t 500 ford, pe segrallino bevisers las di Jack beteja freque sentatives. There were 500 re-resentatives at the convacion. bist No. 1 therefore should have contained only 33? a mon. committee .2. .n. raid no comen Ted betroper vicisis continues respectablished, is in soid, were not permitted to present timin evidence. Contrary to the by-i we, the condition and out to its has contailed Millisiwo or bosome of of aweak asvitatascorast one fitted held levelor wit or eace of con made guiffer arestef enclination and ya to beyong it need best mast tenings approlished When some of those fit no rear gold ware not to seem in. The credentials . cormittee, it is said, pays out inonsistention or salition even to lost gill golf had it mode eso t at abreo meats in the emportion. Only persons holding these identification cards were permitted to take their seats at the opening of the convention. This was in violation of the by-laws. In addition, it is said, 75 representatives who took part in this convention were not elected by a majority vote of the members. Notwithstanding this election procedure, it is said respondents were elected by a narrow margin running as low as 20 to as high as 30 votes.

The above we think gives a fair summary of the averments of these voluminous petitions. The averagets are stated largely by way of conclusions of the pleader and must be examined in the light of the exhibits, the charter, the constitution and the bylaws and minutes of the convention, all of which are attached and are controlling. From these it appears the Faltimore convention was composed of 520 delegates representing 179 communes, Each commune was entitled to one representative in the convention for every 400 adult members of the particular commune. The representatives to the conventions were chosen in this manner: about 90 days prior to each convention each commune held an electoral assembly. All the groups in the commune sent delegates to the electoral assembly in the proportion of 1 delegate for every 25 adult members. At this electoral assembly there were selected nominees for the post of representative of the commune to the convention of the Alliance to be hald in Baltimore. After the nominations were made the groups in the commune elect the representatives from among these nominees. The result of the balloting, with respect to each group, is certified to by a board of five election judges. If there is a contest as to the election of any representative, it must be submitted in writing to the executive boards of the commune. An election contest commission was then created to hear the contest. This local election contest commission was composed of two members appointed by the executive board of the commune, two chosen by the aggrieved and defeated candidate, the fifth to be selected by these

cery articus. Indee was in viel (los es by-lews. la satition, convertions. In satition, convertions. In satition, it is said, ve represent lives was tone part in this convention were not allested by a satitives was of the satitions of allestich translation are convented to a said respondents were alsoted by a satitude of the said respondents were alsoted by a said of the said respondents were alsoted by a said respondents were alsoted by a said respondents were alsoted by a said value.

simply one one to gament that a sort; Maint ov scota one these buses our street or ... or it is not related to est hi bealters of sens but tabeals wit to amplaulouse to yer yd and out has not militared and , returns out , stidione off to theil love and minutes of the ourse lies, il of which are ste our and are constraining. Fro. these is enjoure the maits are convention was connected to figures representing 178 commune, one To'r meiliag was ond ni seit duserang out of hilliche sow on moo seary 400 adult are bors of the perticular continue. tacives to the conventions were chosen in this number; -te intotpole he blen puntaco noco nel covide con el tolte eyo: sorie and the great in has summer and al acrety and lik . yldmos sinky as very not the state of it described at the glames Larot ASSESSED BUTTON AND THE COMMENT PRINTED BY AND DE APPRING for the post of representative of the commune to the consumity of the Alliance to be held in laltimore. After the nominations were sand Aur'l correct and render that sends one ago nit si senon, sait shem these nominees. The remain of the bulleting, this respect to each group, is certified to by a loant of five thection judges. there is a contest we to the election of day restron thise, it must be substituted in writing to the executive boards of the community An election contest commission was then created to hear the contest. atsame out to heave ee any neissimmon farlan moisorie impel aid? appointed by the executive beart or the commune, tee orden by the egarioved and defeated candilate, the lift. to be selected by these

four as a "super-arbitrator," This local contest combission was charged with the duty of hearing the contest and its decision was final except in the case of a further appear to the committee on credentials and control, which is a convention committee appointed by the censor. The committee of credentials and control consists of five representatives to the convention. Its duty is to hear and to act with respect to appeals from the decisions of the local election contest commissions upon contests of defeated candidates for the office of representative to the convention. The credentials consistee had no power to consider cases which had not been exa ined by the local election contest commission. From the action of the committee on credentials and control, parties thinking themselves as rieved were entitled to Turtuer appeal to the convention itself. As respondents point out, every defeated candidate for representative had four possible remedies under the rules of the constitution and by-laws. He must first make a written protest to the commune, and, second, if ineffective, he might then obtain a hearing by a local election contest commission appointed as above described. If not satisfied with the decision of the local committee he had a right to obtain a nearing before the committee on credentials and centrol, and if the decision of that committee was adverse ne was finally entitled to take an appeal to the convention itself.

Respondents point out that there is no allegation in the petitions that any one of the candidates who were declared elected at the Baltimore convention received a less number of votes than the opposing candidate.

It is not claimed that there was any inaccuracy in the counting of the ballots or in the tabulation thereof, or any fraud in the manner in which the vote was taken and counted.

four as a "steepent trains. ' Inda hered contess omenas a charged with the date of negating was continued to the decision personned and or inegge weathert a To easo all at despression from the on executives weither the color of asimp, that we be the consistence as to mandakens out at Mi oder ye en accourt diff out to the team of branolimin lo sdestino una Lencia il mese de duos medernio Isa**ci ori** candidates agar the office of rear behalf of the following. fall altim deals wellands of we on on bed enough to stellar bord off and the second s teller, e . remou an militaber a residence was readio- sit -ne vyser .inc ..lo. stationers: . . Tranil noitur and this to opling of states of the first of the contract to the contract to the contract the c water the relief of the out office on ... one c. ... as for substance of Dail o Wil ten present to a see content, second the inergentine, he wisht when orange a learing by . Lead. executes company will be en our dit a helilist son il . bei ree a escu en fedaloger weis and the state of t Defere are est ister as executive and construction in it the contra part of Relation will entrant a country by any south one sell to not

tess the solutions for the constant of the state of the s

It is not eleised that the range as the incommany in but counties of the had ots or in the tabletion thereof, or one tradiin the mamer in which bis vote say there counted. The petitions aver serious charges were made against h.

Rozicki: that by reason thereof he was not competent to act on
the credentials committee; but the petitions do not show what the
nature of these serious matters were, nor whether they were such
as to preclude him from acting on the committee under the constitution and by-laws.

There is no allegation that any local election contest commission was ever appointed to consider any contest as to his election. As a matter of fact, the election of Rozicki was challenged. The duty in the first instance rested upon officers of the commune under the constitution and by-laws to appoint two members of the committee to investigate the matter; the defeated candidate to appoint two others; these four to choose a fifth; thus forming a local commission composed of five members. The petitions do not aver that this procedure was complied with in this case. The petitions do not aver that M. Rozicki received fewer votes than his opponent at the election, or that the candidate opposed to nim, who was defeated, contested the election before the local committee. As to M. Lada likewise there is the same lack of material averments. His right, it is said, was challenged, but upon what grounds the petitions do not inform us. The same situation exists as to K. Domanski. It is manifestly impossible to hold that there was no lawful committee on credentials, or that the convention was illegally constituted on this account. The averments of the petition in this respect, in the light of the provisions of the by-laws and constitution, are mere conclusions of the pleader.

Relators say that 78 delegates sought the aid of the supervisory council and that 14 members thereof made a written demand on the censor, etc., but there is no averment in the petition from which it appears that these 78 objectors (or any

in a rolling and the control of the

the a section of the property of head as the section of the to all ty in the first instance in the control of the the examinate while or the orthodistriction in lighterm to the distriction of have let us ; those and ess, its partition and le eradines public a second of the contract the contract of the contract o thus for ing a local commission. so years of the cohers, and it pake haldanon and arek come that and rows for the emplifited this case. Ind patitions to not aver incl. .. howless years the - was the function to the sellent and in an anage all and select toward diffate a poset to ute, The was deffected, contested the charge before the local condition, as to h. Lada liberise there is the core look of maturial aversacie. The right, it is sain, were challenged, has apon what (founds ine settions in res information Viscotiva el di . . Nomench . Tot es escite coltendia ema emi impossible to nold that chere was no lawful condition of bldissogni tire to that the occuration was illustily occurationed on the The average of the petition is this respons, in the light of the provisions of the hy-laws and cassifiation, or mere conclusions of the sleader.

Medators say that 70 dole, they seamly the sign of the states as an of the supervisors council as that le sembers there of hade a written feath on the center, the., but there is no avenuat in the position from that it appears that these 70 objectors (or any

one of them) ever pursued the remedies which were available to the defeated candidates. The sensor was powerless to act until relief had been sought under these previsions. The same observations may be made as to the matter of the executive committee and the demand made upon it for records, books and incurrents in the possession of the censor. Manifestly, under the circumstances, the censor had no right to deliver up such books, records and documents.

The relators say that the committee on credentials and control seated some 38 representatives who were not entitled to seats in the convention; but it does not appear that these defeated candidates for representative presented contests to the commune or to the election contest commission thereon, or to the convention itself. Moreover, none of these defeated candidates has joined in this suit. Manifestly, under such circumstances, it is impossible to mold that the defeated candidates were wrongfully deprived of their seats in the convention.

Relators, by their amended petition, show that the election of 317 representatives was unquestioned and unchallenged.

261 of the total of 520 representatives would constitute a
quorum. It would appear that these 317 representatives were,
therefore, properly seated, had full power and authority to pass
upon the election contests of any representatives who might feel
themselves aggrieved and apply to the convention for relief.

It the minutes of the convention are examined, it appears that relators are wholly without reason to complain. It appears therefrom that the censor requested that all contesting representatives be given an opportunity to present their contests directly to the convention; that on the motion of one of the relators it was voted that "all members on either side" begiven an opportunity

Interestions of the say that have one tited of explaintable and control and footed of the control and the control and the control and the control and control and

Neders, by their smended petrion, seer test in exection at the exection of the exection of the exection of the exection of the execution of the exection of the execution of the execu

If the minutes of the ornsentian are and inea, it reports that relators reconstantly without reason to conclude. It may are the teartest that the onest requested that and cathesting retreations to my onestantly to present their sortests directly to the convention; that on the method of one of the relators is to the convention; that on the method of one of the relators is

to present their cases directly to the convention, and that each contestant was thereupon given 15 minutes for that purpose; that afterward on the motion of the same relator, this time allowed was reduced to 10 minutes; that the convention spent practically all of its time during the second session, which lasted from 2:15 p. m. to 6:00 p. m., and during the third session, which lasted from 8:00 p. m. to 12:10 a. m., during the fourth session, which lasted from 9:23 a. m. to 12:15 p. m., during the fifth session, which lasted from 2:25 p. m. to 6:00 p. m., during the sixth session, which lasted from 8:40 p. m., to 12:05 a. m., during the seventh session, which lasted from 10:35 a. m. to 12:40 p. m., to the consideration of contests by representatives. Sometimes the convention overruled, sometimes sustained the recommendations of the condittee on credentials and control, and the voting does not show any set party lines. Seven sessions out of a total of sixteen, and 2 days out of a total of 7 were spent in the examination of contests of candidates for representative. It would seem relators have no ground to complain that they were refused a hearing.

As a matter of fact the convention seated one of the additional relators, halisz, after deciding a contest in his favor.

No defeated candidate for representative has protested against the action of the convention by joining in this suit. The complaint that persons with grievances were prevented from a meaning by the use of a loud speaker and microphone on the part of swietlik, who then proceeded to swear in some delegates preparatory to passing on the eligibility of the delegates whose rights were challenged, is inconsistent with the proceedings as shown by the minutes of the convention, which is a part of the pleading.

These petitions by relators, considered as a whole, amount

tern for the incitation was an identified and these of no olds ends of a policy of the article and the series as fire motion Villegraphic on the Helphy Academic . I broadening of or foother way all at its than taris for recount on time, when have a livet Silb of the continue of the part of the state of the sections of the section of t lasted from Grow of w. to 19:30 of w. . . . to for fourth frozing, session, shiek leated from a: 00 o. m. to a: 00 p. m., i ming wit sints ession, which bear Alam Alfa g. r., to Arth b. m., furiar the revenue estate, raion lasked trop 15:50 c. m. to Lud. c. m., to the machinemaken of mankeeve by representatives. amelians the convertion everysis, sometimes welled and the column and the process of the contrates on erectable and the sacitations veting does not and rate three, saven seasing the su a total of sintern, and 24 days one of a caina of 74 ners no 1 i. the examination of ecuteres of the fires for a marriage. ment were reported to the property of the contraction of the ment refused a Louring

As a micros of fact and contention sected one of the falltional relators, assist, siter deciding a content in his favor. Be defeated confidence for representative that processed the conficient action of the sourcestion by foliaing in this sale. The conficient that percent site priorences were prevented from a nearing by the use of a leak species whetere on the next of thefeatily, and chan proceeded to areas in commission and experingly to action on the eligibility of the delegates and may be not the file is incompleted with the proceedings as shown by the adouter of the convenient with the percentage as shown by the adouter of

trese netislone by relators, considered as a wade, around

in substance to the contest of the election held at the 27th convention. In order to prevail it was necessary that the petition should over facts, not conclusions, from which it would appear that in the absence of the illegal and improper matters of which they complain a different result would have been obtained. These petitions do not set forth such facts.

VIII. The law applicable to proceedings of this nature is well settled, It is necessary that the petition shall disclose facts to the court sufficient to show there is a probable cause. People v. Union Elevated Ry. Co., 263 Ill. 32. The petition must recite facts, not mere conclusions, and the averments of fact therein must be made in such manner that, if the material allegations are false, perjury might be assigned thereon. People v. Emmerson, 313 Ill. 209; Paople v. France, 714 Ill. 51. The writ of quo warranto is not a writ of right, but the granting of it lies in the sound judicial discretion of the court. The court should carefully consider all the facts and circumstances, the motives of the relators, the public interest, the necessity of the parties and the entire situation from the standpoint of the parties and of the public. People v. Chandler School District, 311 111. 224; People v. Willer, 331 Ill, 395. The petition stands as a complaint. If it is sufficient, a rule to show cause is entered. The issues are made by the complaint and may be denied in the answer to the rule to show cause. But an answer to the petition is not proper and does not avail. People v. Drainage District, 193 Ill. 428.

IX. We have considered the averments of these petitions in the light of the constitution and the by-laws, the interests of the respective parties to the litigation and the organization of which they are members, and the rules of law as laid down in the

## THE RESERVE OF THE PROPERTY OF THE PARTY OF

vention. In order to aprevil it was a censeary that the prolifer named and the prolifer named are such that the the the second to the second and the second that the second and the second and the second that the second are the second as the second are the second as the second are the second

Vill, inc her spelicedly to erroring yest this issure venta at the a set as a contact with the set as a first firm at frote to the centric cutivotest we close the referred to the contribution as as a Poculary diagonal and all west and and all and and another and resite flate, not man equalizations, and the community of flate -. 1-if Engres to this till, that an arrange of the set of the country is tions on thing, continue to be arrived in the speciment, on his conditions Liverent, All 181, The March v. Struck, the 13, St. The wist lies in the sound following the control of the court, the court end , neoreta forte for about the file well-need will ferre times motives of the relations, the rublic interest, the modesoity of the partition and the edition fitted that the commendate of the partition and of the public. Penale v. Guardier to beat interior, 511 111. 204; Roosle v. Willer, 331 121, 300, Man polition at the se a It it is aut. isient, a marra ow ever to achaped. The Legues are underly the companion for the large entropy of modeliles of the property and the labour owner of the eff of the the Allays for a tot has assert for bi 105 July 1002

The control of the continued the control of the second of the second of the control of the control of the second of the second of the second of the control of the second of the control o

foregoing decisions. In the trial court the appeal of the relators was to the judicial discretion of the court. In this court, upon appeal, the question is whether the trial court rightly exercised its judicial discretion in refusing to permit the writ to issue. For the reasons indicated we hold that the trial court properly exercised its discretion in refusing the writ, and the judgment is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

Torografia a fooderland. The second control of the second of the second of the second of the first first first of the second of

O'Common n cancil, W., comean.

MLEANOR K. RUDDIEAN,
Appellee,

VS.

ECLIPSE LAUNDRY CO., a Corporation, and LEON BERNBACH,
Appellants.

1

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

289 I.A. - 102

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

About 3 o'clock in the afternoon of may 16, 1934, plaintiff was driving a Mash sedan westward on 53th street in Chicago; defendant Bernbach was driving a Chevrolet laundry truck belonging to his employer, the Eclipse Laundry Co., northward on Woodlawn avenue; at the intersection of these streets defendants' truck ran into plaintiff's sedan, injuring her; she brought suit and upon trial had a verdict of \$15,000; the court required a remittitur of \$5000 and judgment of \$10,000 was entered against defendants, from which they appeal.

On 58th street, before entering Woodlawn, is a "Stop" sign facing vehicles going west, and on Woodlawn, before entering 58th street, is a "Slow" sign facing vehicles traveling north; on the southeast corner the view was obstructed by shrubbery and trees growing on the lot inside the sidewalk line.

Plaintiff testified that she was going west on 58th street and as she approached Woodlawn she came to a complete stop, looked both to the north and to the south on Woodlawn and noticed a car approaching on Woodlawn from the south about half a block away; that she then proceeded to cross Woodlawn, soing about live or eight miles an hour, and when she got half way across Woodlawn she saw defendants' truck "flashing" at her and it struck her car on the left side near the rear. Defendant bernbach testified that he saw plaintiff's car when it was about fifteen feet east of Woodlawn

,

200 A.1 205

IN THE THE WORLD'S AND AND AND AND THE WORLD SECTIONS OF THE

Around 3 of 1 point in the show of 1, 10 styles, 10 to 3, 10 styles, 11 to 3 to 11 to 11 to 12 t

The second of th

The state of the state seed in the state of the state of

and that it did not stop but came into the intersection at about thirty miles an hour.

Charles Wood gave testimony tending to corroborate plaintiff's story. He said that when her car passed him on 50th street 125 feet east of Woodlawn, it was slowing down and was then travelling 15 to 20 miles an hour. George Hlamm testified that he was driving north on Woodlawn, a short distance behind defendants! truck, that it was swaying first to the left and then to the right, and that immediately prior to the collision it was on the west side of Woodlawn. Defendants introduced evidence tending to show that the speed of defendants! truck was regulated by a "governor" set for a maximum speed of 28 or 30 miles an hour.

Plaintiff's car weighed 4200 pounds, defendants' truck 1800. Photographs of plaintiff's car taken after the accident snow substantial and severe damage, indicating that defendants' lighter truck must have been going at a high rate of speed to inflict such damage.

Defendants argue carnestly and with skill that there was no question of fact to be submitted to the jury; that the defendants were not guilty of negligence and that plaintiff was guilty of contributory negligence. It has been repeatedly said in many decisions that as a general rule questions of negligence and contributory negligence are questions of fact for the jury (Petro v. Hines, 299 Ill. the 236) and that plaintiff the undisputed evidence is so conclusive that the court could arrive at no other conclusion than that the injury was the result of the negligence of the party injured, and that if reasonable minds arrive at different conclusions, then it is a question for the jury. Chicago City My. Co. v. helson, 115 Ill. 436.

In the present case there is some conflict in the evidence

" alical composition of the action of the contract of the cont

Just constant additions to represent the constant of the constant of a 1991 of the constant of

The indicate the control of the cont

The state above the little and the control of the state and all the state above the state of the state and state and state and state at the state and state and state at the state and state at the stat

as to material points. There is a dispute as to whether plaintiff stopped before entering Woodlawn avenue, and also a dispute as to the speed of defendants' truck as it approached 58th street. The variant testimony was for the Jury to weigh, and its conclusion to accept plaintiff's version cannot be said to be unreasonable.

The jury could also properly conclude that plaintiff was not guilty of contributory negligence and that defendants were guilty of negligence as charged. Under such circumstances the court of review will not disturb the versict.

Upon the motion for a new trial defendants presented what is designated as newly discovered evidence. The trial court. however, was of the opinion that this evidence could have been presented by defendants at the trial. Plaintiff was injured May 16 and taken to the Billings hospital where X-rays of her injuries were taken on May 17; these were not introduced upon the trial, but X-ray plates taken on June 30 were introduced by the plaintiff. Defendants on their motion for a new trial presented an affidavit to the effect that prior to the trial their attorney attempted to obtain information from Billings hospital concerning the physical condition of plaintiff when she was admitted, but was refused guch information: that after the trial, under a subpoena duces tecum, the hoseital produced X-ray plates of the plaintiff with findings taken on May 17 which tended to show an absence of injuries which were shown by the X-ray plates taken on June 30 and introduced on the trial by plaintiff. However, it was snown to the court by an affidavit of the attorney for plaintiff that defendants' counsel knew some time prior to the trial that plaintiff was taken to the Billings hospital immediately after the accident and that X-ray pictures were taken there, and it was asserted that defendants had sufficient time to obtain and introduce them in evidence at the trial. The affidavit of plaintiff's counsel further tended to

enth theory as as a few of the dest policy of Pelous Ing does a gard Colonia - The Arabana - the rest policy of the arabana -

es an electricity of the contribution is an electric transfer that is a second of the contribution of the electric transfer and the contribution of the contribution o

which was tan properties Inches all the Fig. 10 act (comment ter territaria o continuo de la compania de la comp professions for the extra the form of the form of the form of the first of the form of the and the second of the second we. It's winder a successful that is the or in the section of the prostrettion of the amount of the way of the item of the or there and ⇔ថ្ងៃការប្រជាពលរបស់ ក្នុងសេស ការ៉ា បែលស្ថិតថា ការប្រជាពលរបស់ ប្រកាសស្រាប់ និងប្រើបានការប្រ Freing to the discrepance for it used applified some notice to tal mist For the state of the thirt and the Wilder to the History then these checking a transplant of the test test test to the a minute that the build have not been been break by Instead and build define including a common of two ments of the first and the ination base control of the State State of the State State of the State State of the State the and the second of the seco Martin I in the fact that we will always the feet or equilibrial មាន ស្ថិតនៅក្រៅ ស៊ុន ស៊ីនា ( ) ស្គារី ( ) សាស្រី ( ) ស្គារី ( ) ស្គារី ( ) ស្គារី ( ) សាស្រី ( ) សាស្រី ( ) ស្ show that the X-ray pictures taken at the Billings hospital were not taken for the purpose of showing the condition of the vertebra and that no pictures showing this condition were taken at the Billings hospital. Even if we assume that the X-ray plates taken at Billings hospital on May 17 were of any substantial importance, (which is very doubtful) yet it is clear that defendants' counsel could have obtained them by a subpoena prior to the trial just as easily as they were produced upon a motion for a new trial. The court's ruling in this respect was proper.

hypothetical question to which defendants objected on the ground that it omitted some material facts. All the facts stated in the objection by counsel for defendants were adopted in the final form of the question. Defendants say that one of the facts assumed was no injury to plaintiff between May 16 and June 30, 1934. Whether plaintiff received in this interval any injuries could have been easily determined by defendants, and we know of no rule which would raise any presumption of any other injuries than those received in the accident which is the basis of this suit. Moreover, the record shows that the possibility of an accident to plaintiff between these dates was discussed by tota counsel in the presence of the jury, so that it must have considered this fact in arriving at a verdict.

Complaint is made of the cross-examination by plaintiff's counsel of the witness Peterson, a police officer who made a report as to the appearance of the cars and certain tire burns or said marks after the accident. This testimony was not important and any errors with reference to asking questions without a proper foundation are not prejudicial.

We agree with the contention of defendants' counsel that

prof. A state of the control of the

ATE THE A SECRET HERE WE ARE THE REST OF A PROPERTY OF THE AND PRO

the decree to be supported by both about the set of the

the questions to defendant Fernbach as to whether he had a license to drive his employer's truck at the time of the accident or at the time of the trial were improper, but nothing sufficiently serious to require a reversal occurred either in the examination of the witnesses or in the argument of plaintiff's attorney to the jury.

Plaintiff suffered diagonal fractures of two ribs on the right side and a fracture of the eleventh dorsal vertebra; she was three days in Billings memorial hospital and two weeks in Michael Reese hospital; she was put in a plaster cast from June until August, 1934, extending the spine; for four months and over she wore a steel brace extending from her hips to her neck and was wearing a steel corset at the time of the trial, which was nearly two years after the date of the accident. There was evidence that twenty-two months after the accident the dorsal vertebra was compressed; write this time she suffered from pains in the back and was unable to stand on her feet for any long period. We cannot say that the judgment of \$10,000 is excessive.

Although there may have been slight errors during the trial there is no reason to believe a different result would follow upon a second trial. Where a trial has resulted in substantial justice, slight errors will not compel a reversal.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

### The state of the product of the

Amin's ettle tillet, enterne i vila reef van geweens i mendig neer velkel biges plans i Jesus tive a ev iva ef menen es til sveti "eyto ki julia en ture til besid avan er keina van av it med seens v "Ister ren. Jugus van ille seens in lie

Logar & TVL and Logar Logar Logar Logar Logar Logar Logar Rev. 10 (4.0)
 Logar & Con.

address of the formation of the contract of the

39186

UNDERGROUND CONSTRUCTION COMPANY, a Corporation,

Appellee,

VB.

THE SANITARY DISTRICT OF CHICAGO, a Municipal Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

289 I.A. 809

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Upon trial, without a jury, in an action to recover damages on account of defendant's breach of a contract, plaintiff had judgment for \$60,866.58, from which defendant appeals.

This case has been tried three times. After the second trial appeal was had to this court, which reversed the judgment and remanded the cause for another trial. (277 Ill. App. 618.)

April 26, 1928, plaintiff and defendant entered into a written centract whereby plaintiff was to construct a brid, e. saperstructure and approaches over the Sanitary canal on south crawford avenue in Chicago; the contract called for monthly payments in installments as the work progressed; the work was commenced and several monthly installments paid. The installments we December, 1926. and January, 1929, were not paid because defendant was enjoined by court order from selling its bonds; for this reason plaintiff suspended work. Afterward legislation was obtained authorizing the bonds and on November 21, 1929, plaintiff resumed work, at which time a supplemental agreement was entered into extending the time within which the work was to be completed; thereafter the work was completed by plaintiff, who was paid in full for the work done. Plaintiff claims to have suffered damages on account of the suspension of the work caused by defendant's failure to pay the monthly installments provided in the contract.

Plaintiff contended upon the prior appeal that defendant's chief engineer had a reed that plaintiff might suspend the work and

CHANGE CONTRACTOR OF THE STATE OF THE

policy of the state of the

Sour List to Acres Silving in A

## BURELS 18

er in the dayner of buller in the first of the or a first each

the fitting and publication of a transfer to discuss on the second of a start to discuss of the second of the seco

I see an an alti an illamenta tagliana persona del mano d

PRESENT TO THE COLOR OVER THE STATE OF A STA

plum destino dessi detto e noine ost mest bei attico l'illelisia. En la compatitation dessi noise de la compatitudi e la comp that it would be paid all damages occasioned by such suspension.

After examination of the evidence, which is set out in our opinion in considerable detail, we held that the evidence did not support this contention; that the most that could be said is that the engineer had expressed the thought that plaintiff would be entitled to consideration for damages.

Upon the present trial counsel for plaintiff suggests that there was further evidence tending to support the claim that defendant's engineer had promised that plaintiff should be reimbursed for damages, but this additional evidence does not add anything substantial to this issue and we reassert our conclusion that the evidence fails to show any such promise by the chief engineer.

promise to pay, plaintiff cannot recover special damages. The original declaration consisted of the common counts and a special count, predicated upon the theory of the chief engineer's promise to pay; subsequently plaintiff filed two additional counts claiming damages for breach of contract predicated upon the theory of a direct liability of the defendant without reference to any promise of the engineer; demurrers were filed to these additional counts, which were overruled, and defendant filed pleas and affidavits of merits, to which plaintiff filed a replication. The case was retried on the theory that the defendant is liable independently of any promise by the chief engineer. It is axiomatic that one good count will support a judgment.

The brief of the defendant filed in this appeal is virtually a reprint of the brief filed by it upon the prior appeal and makes the same points and ar unent we considered and passed upon in that appeal. We there held that "Plaintiff having had the right to suspend the work on account of the default in payment of the installments, may recover as damages any direct loss sustained by it.

The second of th

with and the state of and the state of an included the state of an included and a state of a st

The control of the property of the control of the c

 Louisville & A. Ry. co. v. collerbach, 105 Ind. 137; Selden Breck Const. Co. v. Regents of Mich., 274 Fed. 982."

In our prior opinion we stated our views for the guidance of the trial court upon the next trial. We neld that the measure of damages for the loss of use of machinery and equipment was its fair market rental value; we held against plaintiff's claim for interest on the amount retained by defendant under the contract during the time the work was suspended; we also held that plaintiff had the right to suspend the work on account of the nonpayment of the December and January installments; we also held against defendant's contention that plaintiff's damages are limited to wages paid by it for necessary watchmen during the period the work was suspended, and for extra premiums paid by plaintiff on its bond on account of the additional time required to complete the work. On the prior appeal it was contended that the act of plaintiff in obtaining judgment for the amount of two installments, which has since been paid, is res adjudicata of plaintiff's entire claim. We held this contention was without merit.

Upon this last trial a stipulation of facts was entered into between the parties, giving a history of the transaction and the work involved and the supplemental agreement; the parties stipulated as to the correctness of the amounts claimed as dames suffered by plaintiff by reason of the suspension of the work; these are wales, rental charges, cleaning, reconditioning forms

And the property of the control of t

the masses of the second standard of the second standard of the second s

and equipment and differences in the scale of wages; these aggregate \$60,866.58, the amount of the judgment; defendant in the stipulation reserved only the question of its liability. The stipulation followed the items of damages which we have already approved in our prior opinion, and, as we said in that opinion, defendant is liable for such damages.

Upon the prior appeal it was asserted that the court improperly ruled on propositions of law submitted, and the same argument is made upon the present appeal. We find no reversible error in this respect.

After the decision of this court on the former appeal there was nothing for the trial court to do after the case was remanded except to pass upon the amount of damages plaintiff had sustained, following the directions laid down in our opinion, and as the amounts are stipulated to be correct the trial court could only assess the damages against the defendant.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

And the second production of the second control of the second cont

The state of the s

The rest to the second of the

.

Address, ..., .. . 1 - Norser, J., concra.

39195

CHARLES F. ALEXANDER,
Appellant,

VS.

STATE SAVINGS BANK & TRUST CO., et al., Defe dants.

On Appeal of CHARLES F. ALEXARDER,
Appellant,

VS.

LIBERTY NATIONAL BANK OF CHICAGO, Appellee.

APPEAL FROM CIRCUIT COURT OF COOR COUNTY.

209 I A. 610

AR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This cause is here on its second appeal; on the first defendant appealed from a judgment for \$5991.53 entered against it by decree pro confesso upon an order of default; defendant filed its motion and petition (chap. 110, par. 270, III. State Bar Stats.) seeking to have the default order and decree vacated; the trial court denied this motion and defendant appealed to this court.

In our opinion filed on that appeal (281 III. App. 88) we held that safficient service had been and upon defendant, but also held that the petition alleged facts which, if they could be proven by defendant, would relieve it from any liability; we reversed the judgment and remanded the cause for further proceedings consistent with what was held in that opinion; the mandate was filed in the Circuit court, which thereafter proceeded as we had directed and vacated the order of default and the judgment; defendant filed an answer amplifying the allegations is its petition, the matter was referred to a master in chancery who heard evidence and reported, finding that the allegations of defendant's answer had been proven and recommending that the complaint be listinged; exceptions were overralled and the chancellor entered an order discipation, the complaint

STALL SAVIE SALE STACES - ... TO STALL SAVIES SAVIE

With will be as Director to Borres to

.

, WARES OF BUILD ENDERS A MEASURE

U A A SAST COS

, has a firm as and find the sign of gard flate state does helicate . . .

To see a converted since a fair on as no place to room; to the talk of the set of the see as the see a converted since a fair converted to the set of the same since and particles of the set of the s

In our colinion file; on the Actor of Call III., are, i) read to and called the and and called the and alled the and alled the and the coll of the angle of the a

and plaintiff now appeals.

The brief for the plaintiff has failed to observe our 7 rule/relating to briefs; it makes thirteen points but the argument does not follow these. Plaintiff's argument seems to be that the cause was reversed and remanded without specific directions, which does not have the effect of vacating all orders entered prior to the appeal. Our opinion ordered the judgment reversed and the cause remanded for further consistent proceedings; the mandate ordered that the judgment of the direct court "be reversed, annulled, set aside, and wholly for nothing esteemed," and the cause was remanded for further proceedings as to law and justice shall appertain consistent with the views expressed in the Appellate courtopinion. Pursuant to this opinion the trial court vacated the order of default and the judgment and in so doing followed the directions given by this court.

The master found that on April 15, 1926, Mrs. Lee De Wilt entered into a written contract with the Independence State Bank as trustee for the purchase of certain real property; that subsequently she assigned this to plaintiff; that subsequently a deed was issued conveying the property; that in haron, 1950, the Independence State Bank sold to the State Savings Bank & Trust Co., which did not assume any liability to plaintiff, a part of its assets as listed.

That in June, 1931, the State Savings Bank & Trust Co.
sold to the Liberty Trust and Savings Bank a part of its assets
as listed, out the purchaser did not assume limbility to plaintiff.

That in December, 1932, the Liberty Trust and Savings bank sold to the Liberty Bank of Chicago a part of its assets, and the purchaser did not assume any liability to plaintiff.

That in August, 1934, the Liberty Bank of Chicago was converted into a national bank and became known as Liberty National

as her in a super tradition a first out

In trief to the entity in the triates of the entity of entity of entity of the entity

and market found that on April 12. It is made to down that

estimate and the content of the cont

quently and an in we take to desirably; that subsection is, a seek and it is an an incompanies of the seek and in the seek and

.v. seemst a. kurt. og uvert ed tid tide ådeek perik ui trek inregge ggi la (1. a norse egotivet boe ådeel grut dik en hor elek .v. 1. a no to tjäikide il norsett ogs for typenrouseg and re- horeli ak

in a in Dessabur, 1955, the fibersy france and Crings hank will be the offerly and all outsays a orginal life necess, and amo numbers of the stander only lightliky we alstated.

for interest to the little, the biberty make of balonys make the

Bank of Chicago; that none of these banks was taken over or amalgamated with each other but still retained their cornorate entities and possessed assets belonging to each bank individually.

The master also found that plaintiff offered no proof to sustain the allegations of his complaint, except the original contract of June, 1926, between the Independence Jtate Bank and ars. De Wilt, and a deed executed in August, 1931, to her; the master found that plaintiff had failed to show any contractual relationship with the defendants or that any liability accrued by operation of law, and that the listed liabilities of the banks did not include the liability upon which plaintiff predicates his claim.

In our opinion upon the prior appeal we held that if these facts could be proven there could be no recovery against the Liberty National Bank of Chicago. This was the law of the case, binding upon the lower court upon a new trial and also upon the Appellate court upon a subsequent appeal. Gillum v. Central Illinois Public Service Co., 250 Ill. App. 617, 622.

We find no error in the proceedings in the trial court following the mandate from this court, and the decree discissing the complaint was fully justified from the evidence. It is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

an 1690 inc. central companies and the analysis of the second of the sec

treas for each control of the second second

.

39136

PEOPLE Ex Rel. HELEN F LEMING CZACHORSKI, Relator,

Appellant,

VB.

BARBARA ARNA FISHER, Respondent, Appellee.

APPRAL FROM SUPERIO R COURT OF COOK COUNTY.

289 I.A. 610

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The People on the relation of Helen Flaming Czacoorski by leave of court filed an information in the nature of a quo warranto. In her petition for leave to file the information against Barbara, Anna Fisher, Mrs. Czachorski set up that she was duly elected attorney for the Polish Women's Alliance of America, a corporation organized under the laws of Illinois, at a convention of the organization held in Chicago on September 28 and 29, 1935; that at such election she received 210 votes and Mrs. Fisher 205 votes, and she was declared duly clected; that hirs. Fisher, without warrant or authority, assumed to act as attorney for the Alliance and prevented the petitioner from exercising the duties of her office: the prayer was that she be given leave to file her petition and that Mrs. Fisher show by what authority she claimed to exercise the office of attorney. Leave was granted, the petition filed, and after a number of motions and orders were entered the pleadings were settled and there was a hearing before the court without a jury. The court found Mrs. Fisher had been duly elected as attorney for the Alliance, judament was entered accordingly and Mrs. Czachorski, the relator, appeals.

The record discloses that the relator and the respondent are members of the bar of Illinois and that the relator has been attorney for the Alliance about 21 years, having been re-elected a number of times; that a convention of the Alliance was held in Chicago on September 28 and 29, 1935, at which officers were to be elected, including an attorney; that the relator and the respondent were

and the second of the second o

And a construction of a strict of an edition of the following strict of an edition of the editio

grande de la company de la com

candidates for the office and their names, together with the names of candidates for other offices, appeared on printed ballets. An election committee was appointed to count the ballots; they completed their work about five o'clock a. m. on Sunday morning, September 29, and shortly thereafter reported to the convention that Mrs. Czachorski had received 210 votes and Mrs. Fisher 205 votes. Mrs. Fisher objected at the time, claiming the result was incorrect and requesting an immediate recount: this request was about to be granted by the convention, but it was stated that the ladies comprising the election committee were physically unable to recount the ballots at that time because they had been at work all night, and thereupon the matter of the recount was put over until ten o'clock Londay morning, September 30. hrs. Czachorski objected, claiming that she had been duly elected, but the objection was overruled and the recount ordered. The chairman of the convention then called on all the newly elected officials to come forward and be sworn in and Mrs. Czachorski went forward with the newly elected officers and the oath was administered to her over the objection of irs. Fisher, the chairs an stating the oath would not be valid if the recount did not show Mrs. Czachorski elected. Shortly after this one convention adjourned. Londay, September 30, pursuant to the action of the convention, the election committee recounted the ballots and reported that Mrs. Czachorski had received 209 votes and Mrs. Fisher 216, and reported this fact to the officers of the Alliance on October 15, 1935. Thereupon Mrs. Fisher assumed the duties of the attorney for the Alliance and Mrs. Czachorski was prevented from so acting.

November 4, 1935, the instant suit was brought and the ballots were counted by the court. The court found that Mrs.

Czacnorski had received 208 vetes and .rs. Fisher 112 votes; that

al experience in it follows but the following the incidence in the contract of ing the date and calcinoted and the field of the second according to the field of I serground for the first term of the first that the series of the and the and and the rime only therefore one because of factorious and the talpon e serve pri se se climo nos pro of percio elle do sel are I. Arang araw yark pessioner fin dagnoser in 11 Million of Dag are the first of the control of teaching the same of the same To any and the second of the s al connects our just tendis into the court but levine mount Rect , i arended so not illicate to satelli of their . Mirs, oc seri suderwrae erw itires erac ter ets. Ita

or. .. s. now. dir thin transfer to 1800, to 2000 in the color of the following the color of the

there were 430 ballets east, 5 of which were spoiled and five other voters did not vote for the office of attorney. The court entered judgment on its finding as above stated.

Sunday morning, September 29, made its report which showed to the convention the correct result, and the relator was thereafter sworn in as attorney, the recount by the election committee on the 30th was of no effect and void because in the meantime the convention had adjourned. The relator further contends that the respondent did not sustain the burden the law cast upon her to show that the ballots were so kept after the election that there was no reasonable opportunity to tamper with them, and therefore the ballots were not properly considered by the election committee on the recount, or by the court.

A great deal is said by counsel for both parties as to the facts and the law in relation to the recounting of the ballots by the committee of the convention on Monday, September 30, the relator taking the position that it was of no effect, while the contrary is contended for by the respondent. We think it would serve no purpose to pass on either of these contentions because the ballots were afterward counted by the court, and if they were properly received in evidence and the result properly reached by the court, the legality of the action of the committee conducting the recount is unimportant. Obviously the jurisdiction of the court could in no way be affected by any action of either the convention or its committee.

For the purpose of this opinion we shall assume, without deciding, that the office of attorney of the Alliance is an office within the provisions of the que warranto act.

Where an information is filed in a quo warranto proceeding

AND EVEN TO DESCRIPTION OF A SECURITION OF A S

A constraint of the constraint

The cause quarters don a nit will be ablacted the on and

no proof or evidence is necessary to support it, but the duty is thrown upon the party whose right to exercise certain functions is questioned, to show legal authority for holding and exercising them. People v. andrews, 200 Ill. App. 479; Garra v. People.

108 Ill. App. 531; repola v. Acechler, 194 Ill. 235; People v. Hartquist, 311 Ill. 127.

In the Andrews wase the court said (p. 481): "Pleadings in quo warranto cases are governed by the same rules that prevail in other civil actions. (Citing cases.) The general rule is that the defendant must either disclaim or justify. If he justified he must set out his title specially and show a valid title to the office. The People are not bound to show anything. He must exhibit authority for exercising the functions of the office or the People will be entitled to judgment of ouster. (Clark v. People, 15 Ill. 213, 217; Carrico v. People, 123 Ill. 193; Catlett v. People, 151 Ill. 16; Place v. People, 192 Ill. 160; People v. Receiver, 194 Ill. 235, 233; People v. Central union Tel. Jo., 252 Ill. 260, 271; People v. Baldridge, 267 Ill. 190."

In the instant case the burden was upon the respondent to prove that she was entitled to the office of attorney for the Alliance. On the hearing she assumed this burden and offered in evidence the original ballots, and if they were properly received in evidence over the relator's objection, there is no contention, as we understand the argument, that the trial Judge iid not reach the right result. But the relator contends that the evidence fails to show the ballots were properly preserved and that they were therefore inadmissible.

In a proceeding to contest an election of public officials, Rogers v. Meade, 363 Ill. 630, the court in manouncing the rule of law as to when the original ballots were properly preserved and

If were to it is to the control of t

As the second of the second of

in a recording to making a leading of mario outbiller, to the are the course we have the course of t

admissible in evidence, said (p. 637): "The returns of the judges and clerks are <u>rima facic</u> avidence of the result of the election, but the ballots are the original evidence of the votes cast and in case of contest are better evidence of the result if they have been preserved in the manner prescribed by the statute. (<u>falbott</u> v. Thompson, 350 Ill. 86; <u>Graham v. Peters</u>, 248 id. 50.) Conversely, if the evidence discloses that the ballots were exposed to the reach of unauthorized persons, and the returns are not discredited, the ballots will not be regarded as better evidence of the result of the election. (<u>Talbott v. Thompson</u>, <u>supra</u>;

<u>Rolton v. Whalen</u>, 350 Ill. 50.) The question of whether the ballots have been properly preserved is in each action necessarily one of fact, to be determined by the evidence. (<u>Bullman v. Groper</u>, 362 Ill. 469; <u>Sibley v. Staiger</u>, 347 id. 288.)

In Alexander v. Shaw, 344 Ill. 386, which was an action to contest an election, the court said (p. 395): "If there is no evidence casting discredit upon the returns and there is evidence showing that the ballots were not properly preserved but were so kept that they might be reached by unauthorized persons they are not to be regarded as better evidence than the returns."

In the instant case there is evidence tending to cast discredit upon the returns as made to the convention by the lection committee. When the committee presented its report, the respondent objected that the result announced by the committee was incorrect, as stated by watchers who were present at the time the ballots were being counted.

The question for decision remains, however, and it is,

Does the evidence show that the "ballots were not properly preserved but were so mept that they might be reached by unauthorized

persons"? The trial court found in effect that the ballots were

ed. imaista no reitro et. (i.) in the feethest to the case to the case for each and observed or mot mily and also et. The result of the case that had the held and the case of the the held and the case of the the held and the case of t

For Arminist M. Warding, See And. See, crise that to be noticed to an extice to an extice to an extice the seed of the seed of

in the investment enter the series is evidence valuation, to the classical execution of the location of the location of the location of the contraction of the contraction.

the chestion the destains now year and it is, Does the series were not chemity preserved one vere sees that the medicite te reach. By unauthorized permed on the trial ocurt found in cities that the bailste were

properly preserved and were therefore admissible in evidence, and, as stated in mogers v. mead, 56. III. 550. "The question of whether the ballots have been properly preserved is in each action necessarily one of fact, to be determined by the evidence," and unless we can say that the finding of the trial Judge is against the manifest weight of the evidence we are not warranted under the law in disturbing his decision.

There is evidence in the record from which the court might find that the ballots were presented to the convention by the election committee and the result announced; they were then turned over to the convention and came into possession of the chairman of the convention: that shortly thereafter the convention adjourned and the chairman took the ballots to the offices of the Alliance which were in the same building where the convention was held, placed them in a filing cabinet for which she had a key; that she locked the cabinet and afterward locked the door to the offices; this was early Sunday morning. September 29: that on monday morning when the committee was to recount the ballots the chairman went to the offices of the Alliance, unlocked the cabinet in which she had placed the ballots the day before, found them in the same condition: that after they were recounted by the committee they were again sealed up and later presented to the court. There is some evidence to the effect that there were a number of keys to the filing cabinet in which the ballots were placed held by other persons, and other evidence that might tend to show that the ballots were exposed to the reach of unauthorized persons, but we think it was of such a character as would warrant the trial Judge in nolding that the ballots were properly preserved.

Upon a careful consideration of all the evidence in the record, some of which we have not attempted to analyze, we are clear that we would not be warranted in holding that the finding

The second secon

that it is taking the above the most of the companies of the place of the companies of the opular talla que to a la como la teneral de la especia teneral de la companya de la companya de la companya de with the control of the period of the control of th the way to the control of the section of the control of the contro gorden og gjarrenning med kallen og fikklig finnen er og af størte i filmer er ble mille filmer er ble mille f ga innigero serne didicion sula fino so or or il il vera ca livo ್ಕಾರ್ಯ ಕಂಡಾ ಚರತ್ರ ಹೆಚ್ಚು ಅದರ ಕಾರ್ಟ್ ಕ್ರಾಮಕರ್ಯ ಪ್ರತಿಕ್ರಾಗಿ ಕಾರು ತಿರ್ವಾಗಿಕೆಯ ಮುಂದಿ ಮಾಡುವುದು ಮುಂದಿ ಮುಂದು They would give also bus substant

na si ponobata o a autobo una assila na asferia e care pressa pregione on bossembala son este un assor en on o plesson pressona a accesa de la lastimatant de un asser un o a casso of the trial Judge, who saw and heard the witnesses testify, to the effect that the ballots were properly preserved, is against the manifest weight of the evidence.

The judgment of the Superior court of Cook county is affirmed.

JUDGEFRY AFFIRED.

Matchett, P. J., and McSurely, J., concur.

en produkte i den til år i en i den i de han i en på ede i det en en e den i i då påkonink av i år hen ende kanning i en elle i de tyrk kid de år år i en år i en år en attende år en en år

The Court of the second of the

The medical

•

39189

HARRY J. DIACOU,
Appellee,

VS.

FRED A. SNOW, GEORGE J. O'MALLEY.

GEORGE J. O'MALLEY,
Appellant.



APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

289 I.A. 610°

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

April 5, 1935, plaintiff brought an action of trover against Fred A. Snow to recover the value of an automobile which plaintiff alleged he lost on June 27, 1931, placing his damages at \$500. Snow filed an affidavit of merits denying liability and aversing that on June 27, 1931, he bought the automobile for \$55, and that it was sold by a constable under a judgment order entered by the justice of the peace. More than a year thereafter, June 18, 1936, plaintiff filed his verified petition in which he alleged that all the evidence had been heard but that the court had not made his findings or entered judgment; that during the trial it appeared that deorge J. O'Nalley, as well as Snow, converted and disposed of the automobile, and the prayer of the petition was to make O'Malley an additional party and for leave to file an additional count, and that summons issue against O'Malley; that by making O'Malley an additional party defendant would "not necessitate a new usuring of the evidence due to the fact that he was present during the hearing of evidence on June 5, 1936, and testified fully concerning his part in the matter in controversy." An order was entered on the same day giving plaintiff leave to file an amendment to his statement of claim; O'halley was made an additional party defendant, summons issued, and the cause was continued to July 1, 1936.

On the same day, June 18, 1936, plaintiff filed what he designates an amendment to his statement of claim, which is in the

TRID A. other Cirkins A.

718.43.53

in, about of the open the self and the color of the color

Arril 6, 1106, on insily brown to the term of the province the and a same of the colors of the color of the colors of the callege? To look on Fast 77, and the in the interest of the control of to a compart of the first of the case of the control of the contro bile, we will not get of the an illine who control the samp at minitime of the colline is the colline of owned colline come of incident substitute in the latter product of the late of the latter and the wileuce on Jame b, 1986, and contition fully concerning the nurt of chain; o'n anncy was wede am additioned street dai the o, we mone

on the same day, Jane 18, 1886, pt histor filled which the designates an antideast to his sentennes of claim, which is in the form of a separate count against defendant O'Malley; on June 23 there appears an amended praecipe and statement of claim filed by plaintiff against Snow and O'halley, in which the two counts in trover appear, one against Snow and the other against O'Malley. June 23 summons issued against O'Malley returnable July 1, and he was served by the bailiff. June 29 O'Malley filed his appearance and a demand for a trial by jury of six, also his affidavit of merits in which he denied liability and averred that on August 1, 1929, he was appointed receiver by the Circuit court of Cook county in a suit there pending involving certain premises in Riverside. Illinois, and as receiver he was ordered to collect the rents, issues and profits of certain property; that he found the automobile in the garage at the premises; that plaintiff failed and neglected to move it or to pay the rent for the use of the garage, and on February 26, 1931, upon due notice given plaintiff, the Circuit court entered an order authorizing O'Malley as receiver to take steps by way of attachment to collect the rent from plaintiff for the use of the garage for August, September, October, November and December, 1930, and January and February, 1931; that pursuant to the order he brought suit against plaintiff before a justice of the peace in Riverside and attached the auto-ovile; thereafter jud\_ment was entered in his favor by the justice of the peace; that he sold the automobile under the execution and accounted to the Circuit court for the proceeds of the sale, and thereafter, on January 25, 1932, was discharged as receiver; on information and belief O'Malley alleged that he believed plaintiff had notice of the procoeding before the justice of the peace but failed to defend.

On July 1, the date to which the case had been postponed, when the summons against C'halley was ordered issued, a judgment order appears in the record which recites that the cause came on for hearing without a jury as to defendant Snow, and "by order of"

of string and more contidered and reported and followed and the order of the order of strings.

According to four the faction of the pendent of addiction of sections.

A duly of the contidered of the contidered and sector is a full and order of a full and order order. The contidered of the contidered order order.

The bearing without a jury as to define at them, and "ir sever of

court for the precoult of the curt, but therefore, as Jacquet 35,

lent, was allowers, out the world in the manifer the leader

court trial exparte as to defendant, George J. O'halley"; that the court heard the evidence and found the issues against noth defendants and assessed plaintiff's damages at \$300.

On July 20, 1936, O'Malley, upon notice to plaintiff, moved to vacate the judgment entered against him and to have the case assigned and placed on the jury calendar for trial by a jury of six, and in support of the motion filed an affidavit of defendant O'Malley and the affidavit of his attorney, setting up that when the jury demand was filed by O'Malley, as above stated, the clerk of the court said the case would then au omatically go on the jury calendar, and for this reason they did not appear on July 1. The motion on July 28 was denied, and O'Malley prosecutes this appeal.

Plaintiff has filed no brief in this court. The proceeding followed in the instant case was contrary to law and to Rule 167 of the Municipal court. O'halley was entitled to have his case tried by a jury and the judgment as to him must be reversed and the cause remanded. Obviously this does not disturn the judgment against Snow. Adkins v. Strathmore Co., 278 Ill. App. 183; Forel v. 1324 N. Clark St. Blds. Corp., 278 Ill. App. 286; Opelina v. Sporry, 279 Ill. App. 376.

The judgment of the Municipal court of Chicago as to defendant O'Malley is reversed and the cause remanded as to him.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

and drief ("more than 10 %) sprote (a tr). To and all out to the first frence

- and obtained which is a continue that the continue for the continue that the continue that the continue that the continue that the continue the continue that the con

to very the contract of the co

followed in the incide, organised on subject to the time of loans 167 of the twelving to the organism of the twelving round. Observe of the time of the organism of the twelving to the twelving to the organism of the organi

-busing ... us on, with the serves well elected and see that the true and the second of the well and the second of the serves are the serves and the second of the serves are the serves and the second of the serves are the serves and the second of the serves are the serves are the second of the serves are the second of the

<sup>.</sup> mounted, we is a sommer, we contain.

39 200

JULIUS BROWDY, Appellant,

VS.

JULIAN BLACK, Appellee.

1

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

289 I.A. 6104

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Julius Browdy filed a complaint in equity against Julian Black and a number of other persons who were later dismissed out of the case. Afterward plaintiff filed his third amended complaint, the two prior complaints having theretofore been stricken on defendant's motion. The prayer of the third amended complaint was that defendant, Black, be required to account for profits made which belonged to the partnership theretofore existing between plaintiff and defendant.

Defendant filed his written motion to strike the third amended complaint specifying 4d grounds. The court overroled the motion as to 47 of the points but sustained it as to one, which was that plaintiff had not attached to the complaint a copy of the alleged agreement between him and defendant. Afterward plaintiff amended his complaint by alleging that the contract between the parties was oral. A few weeks thereafter defendant demanded that plaintiff file a bill of particulars. The demand consisted of 57 questions, and in compliance therewith plaintiff on march 27 filed a verified bill of particulars in which he enswered the questions. April 2 defendant filed a written motion to dismiss the suit on a number of specified grounds which were based on the answers made by plaintiff in his bill of particulars, and defendant supported his written motion by an affidavit. The motion was allowed, the suit dismissed at plaintiff's costs, and he appeals.

1010 A 1 0 2 S

ar bit, e un se emploració quim e poch do el meduo ovo a de inicia with the contract of the contr year you mitrime the test which of arthur of a set he greated with

ាក់ស្តី ស្រុក ខណ៌យលិក ស្ថា ស្រៀវថាស សស្សារស្នែក សេរ៉ា ។ សេរ៉ា បាន។ ស្រែកដែន ប THE LACE THE BEACH INDICATE A GENERAL SECTION OF THE CALL CO. MAI . O jejo o sob which has of relegion to the cold this on in the same ...!! មក្សាទីមុខ គីស្នាន់នៃគេ ១.៦ ទី១៩០ នៅក្នុងនៅ ក្រុម និងនេះខែក្រុម នៅថា បែកបាន partice was oral. After resident and the series of the contraction and plaintin'i l'ile a billa as parsionlers. I a denoue cassist. Les continues garatica, realin compilers a leavelle of this or this or three or the a varities ail to or particulare in where se engage to this feitime a e de atua en contrata os relici messira a falia sucha has a tirad of a second of the fact of the rest of the second of the s bottootto it als bill of santholita, and Atlantic to all the si Tributele ye ting well-team action by our filthweit. The tooking twee allored, then .alpage. 6. in .assoc attisaiele us besainsis sins

Counsel for plaintiff in their brief say that the baird amended complaint "charged that for a period of more than five years immediately prior to July 7, 1934, the plaintiff and dofendant were equal copartners under an oral copartnership agreement and had been engaged in conducting a cigar store, restaurant and care, and also from time to time from the earnings of said business purchased certain stocks and bonds, and that on July 7. 1934, the partnership had assets to the amount of \$9000 in cash and certain stocks and bonds;" that John Roxborough made an oral agreement in the city of Detroit with Joseph Louis Barrow. generally known as Joe Louis, by which he screed to advance money to Louis for expenses in training as a professional boxer: that in consideration of such advances Louis agreed to give Roxborough one-third of the profits earned by Louis from boxing. stage appearances and advertising; that afterward Roxborough entered into an oral agreement with defendant, Black, whereby Black was to furnish the soney needed by Louis in his training. and in consideration, Roxborough assigned one-helf of his interest in his contract with Louis to Black; that defendant, Black, in carrying out his agreement with Roxborough used \$9000 of the funds belonging to the copartnership between plaintiff and defendant; that Black made profits out of the contract with Roxborough in excess of \$50,000, and plaintiff seeks to recover onehalf of these profits.

Plaintiff in one of his answers (set up in his verified bill of particulars) states: "the cigar store, restaurant and cafe were operated with losses and consequently abandoned by mutual agreement of the parties." And further, in response to questions as to that kind of business he and plaintiff were engaged in on July 7, 1934, answered that the business was the

. .

the grouped group of the control of the control of the grown cases for the beauti that man pure thed especial to a comment of the comment of the steed at cold the second of the creation for all the fact of terms of the steed and the amountment of the section of prairie di seu diasche elicul manno le spris ent ul present de forc the end are involved in the control of the control of the control of are the retited of the first field (published on the appearance opers ting the term of the same of the same and the same and the same Rand's who the standard for company the standard to the standard and the same the sound to be the second of at the desired that some jostic or eight differ territaes off wi and the Co.P. In the forestabling All the acting aid the manipuses in the first in the table of the principal of the indicate and the first and borewell in errors of SC, J.C, and Welsell Cont. to be an area and .edd. in eareth lo blod

elimital is one of the event of a terms in the mistal infer to include the biline of a state of a s

"operation of two policy wheels located at 70 East 28th street, Chicago, Illinois. \*\*\* known as BAST & WEST and BORTH & JOUTH."

Defendant's motion to dismiss the suit as above stated, was supported by an affidavit of Ineodore Robinson, who in his affidavit apparently qualifies as an expert; he swears that "policy wheel" is a well known ter. For a gambling machine or device used for wagering money, such game being commonly known as "policy."

Plaintiff contends the court erred in going beyond the face of his third amended complaint in passing on defendent's motion to dismiss the suit, apparently on the theory that a bill of particulars could not be considered on the hearing of such motion, but no authority is cited. We think there is no merit in the contention. Prior to the going into effect of the present Practice Act January 1, 1934, it was held that a bill of particulars was a part of the declaration. Storling Midland Co. v. Ready & Callachan Co., 236 Ill. App. 403. In that case the court said (p. 407): "The bill of particulars filed by the plaintiff specifically defined the claim of the plaintiff. In the case of McKinnie v. Lane, 230 Ill. 544, the court said (p. 548): The object of a bill of particulars is to inform the defendant of the claim he is called upon to defend against, and its effect is to limit and restrain the plaintiff, on the trial, to the proof of the particular cause or causes of action therein mentioned. " The court then discusses the case of Mc onald v. Pools, 126 111. 13. and continuing said, "In the case of O'Leary v. People, 88 Ill. App. 60, 64, the court held that a bill of particulars is part of the declaration, plea or notice to which it relates. The following cases also hold that a bill of particulars is part of the pleadings: Snyder v. Phare, 25 Fed. 390, 442; menadict v. Swain, 43 h. h. 33, 34; Attrill v. Patterson, 58 ad. 226, 236, 239;

interfame to some the two in the case which is not countried.

The ampropried by as call ovice of the door resulter, on the increase affilesytic on example, the contraction of the countries of the contraction of the contra

fisce of the limit amore common on the persing of the entropy of the control of t

asis (c. 10%): "She bill of bertionings "The state of the state of the

## Starkweather v. Kittle, 17 Wend. (N. Y.) 20.4

In the instant case counsel for plaintiff in their brief. from which we have above quoted, say that the partnership between him and defendant was engaged in conducting a cigar store, restaurant and cafe, and that from the earnings of such business the partnership purchased stocks and bonds, and that it was from such assets that defendant wrongfully took the \$9000. But/his bill of particulars he swears that the partnership lost money in the operation of the cigar store, restaurant and cafe, and since. under the rule of law announced in the authorities above cited. plaintiff would be confined in his proof to the natters set up in his bill of particulars, he could not maintain his suit, because instead of making a profit from the operation of such business losses were sustained. And since plaintiff swears in his bill of particulars that the other business in which he and defendant were engaged as consistency was the operation of policy wheels, and since it appears that the operation of such/gambling transactions and illegal, the court will not allow plaintiff to enforce an accounting for illegal profits.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRED.

Matchett, P. J., and McSurely, J., concur.

## 

In second considerations of the constitution o

use fulfillent of the phrolip of the property of the of page process.

Forchers, F. S., and Landaucky, J., to mar.

ANNA M. HINTZ,

Appellee,

VS.

RIDGEWOOD CENETRRY COMPANY, a Corporation, Appellant. E

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

289 I.A. 610

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint in equity against the defendant praying that a contract entered into by the parties for the purchase of two lots in defendant's cemetery be declared null and void, for an accounting, and for the return of the purchase price, \$1200. The case was referred to a master in chancery who took the evidence, made up his report and recommended a decree in accordance with the prayer of the complaint. Afterward a decree was entered substantially in compliance with the recommendation of the master except that plaintiff was awarded the 1200 with interest, and defendant appeals.

The record discloses that plaintiff owned and was developing a cemetery and had employed henry 3. Lonsford to sell certain
lots in the cemetery. Lonsford employed salesmen and in September,
1923, they negotiated with plaintiff for the sale of two lots. A
contract was entered into between plaintiff and definiant whereby
plaintiff agreed to pay \$1200, the pay ents to extend over a considerable period of time. Plaintiff and the last parment in September, 1922, and at that time defendant tendered a deed to plaintiff for the two lots. The tender was refused on the ground that
prior to the time she entered into the contract for the purchase
of the two lots it was represented to her by the salesmen and by
two of the directors of defendant corporation, on of whom was the
then president, that the several sections into which the cemetery

, in the control of t

Heinsit's files a contract and states an establish that seemed prepare seems of anti-contract prepare of sections for the figurant's established of sections for a definite section of the section of the

distributed of the content of this of this or the content. We not the section to be of every set of endings of the content of the orthogonal of the content of the content

was divided, would have a parkway around each section forty feet in depth, which was to be used for landscaping purposes and that the lots in the rear of such parkway would be used only for graves. Defendant disputed this contention and stated that there were two rows of lots around each section and that they were to be sold for graves the same as the rest of the sections.

Plaintiff testified in her own behalf and produced a number of witnesses who gave testimony tending to sustain her contention, as above stated. The two salesmen employed by Lonsford were not available and did not testify, and one of the directors of defendant company and the then president, Mr. Hanson, had died before the trial. But defendant offered witnesses who gave testimony that it was always the purpose of the defendant to sell the two rows of lots around each section for burial purposes. The written contract between manry c. Lonsford and defendant expressly excluded the two rows or "road" lots from sale by Lonsford.

the evidence further shows that at the time of the negotiations for the sale of the lots, the salesmen delivered a map or plat of the cemetery which slows each of the sections, including the forty feet, divided into lots. A number of photographs are in the record as well as the testimony of witnesses, all of which shows that a tier of two lots extends around each section which is 42 feet, as well as two walkways, making a total of about fifty feet; that these strips were planted with trees and shrubbery; that plaintiff's lots were immediately behind the strip in section 3. And, as stated, plaintiff's evidence was to the effect that it was represented to her that this forty or fifty feet space was to be permanently retained for parkway purposes and not for burial purposes. About the time plaintiff made her final payment in September, 1928, she learned that these

The season of th

number of strongers of competitions of the competition of the competitions of the competition, as since the competition of the

is smile and such as some since of the case of the cas

strips around each section were to be used for burial purposes and that some of the lots were then being sold and used for such purpose. Upon learning this fact she refused to accept the deed and demanded the return of her money.

The master found that there was no evidence denying the representations testified to by plaintiff to have been made by the two salesmen and by the director of defendant, and further, "That the defendant offered no evidence to the effect that the plaintiff had knowledge prior to the time she made her final payment of the fact that burial lots were being sold in the 40 foot space around each section, which plaintiff had been advised was to be a perpetual parkway."

Defendant contends that the plaintiff misunderstood the meaning of the word "parkway" used by the salesmen when they were soliciting her for the purchase of the lots, but that if it be found that what the salesmen stated to plaintiff was not entirely true the statements "were not of existing f cts but related to the alleged future intention of the defendant and cannot be the basis of fraud," and that plaintiff's testiony and her evidence are incredible and unworthy of belief in view of all the facts in the case.

We will not stop to consider the various definitions of "parkway" as given by counsel for defendant because the testimony of plaintiff and others is to the effect that it was represented to plaintiff prior to the purchase of the lots that the two rows of lots around each section would not be used for burial purposes but for landscaping to make the cemetery beautiful, and that graves would be placed behind the trees and shrutlery that were in those forty odd feet.

If plaintiff's version is to be believed, and there is

strive around their section were to be used for invital purposes and that come of the local section and their such that such purposes. Unon learnary this I of our returned to company the deed and demanded the return of her money.

The master found test bears to avidence dasping the representations testions testifications proposed that it is a successive to the standard of the following and the following the following the standard of the standard of the standard of the first time papers of the first time buried between the second time that the first time to the were being cold in the following scale around such as the miles were being cold in the following scale around such as the many of the first time.

Defendant contends that the pirinal directors the meaning of the road fourier of by the schedule of the road fourier of by the schedule of the they were collecting and for in gurobase of one lots, but that it be found that the the selecter are the training for the solution of the directors for the not of existing for the table to the alleged fature interview of one left oday, and camps be the best of fraud, and that for the interview of the resistance of the interview of the factors in the feet in the feet in the feet in the feet in the sections.

We will not stop to consider the various definitions of "perhaps" as siven by counsel for defendant because the tastions of perhaps" as siven by counsel for the constant because the varieties of plaintiff and others is no the effect that it was represented to plaintiff prior to the purchase of the lots that the two two counsel of lots troud each section would not be used for burial purchases but for landscaping to make one constary beautiful, and shot graves would be placed beating the trees and shrubbary base were in toose forty odd feet.

If plaintiff's version is to be believed, and there is

the testimony of a number of witnesses which tends to sustain her, the representation made to her was one of fact and not of some future intention of the cemetery company.

Defendant further contends that an examination of the plat of the cemetery, which was submitted to plaintiff before she entered into the contract for the purchase of the two lots, discloses the fact that if plaintiff's version is true, practically one-half of the cemetery would be devoted to landscaping purposes and only the other half to burial purposes, and that such a contention could not seriously be made by any person.

We have carefully considered all the evidence in the record, and while there is considerable force in this last contention made by defendant, we think we would not be warranted in saying that the finding of the master, approved as it was by the chancellor, is not sustained by the preponderance of the evidence. The question for decision was one of fact and we cannot say that the finding was not warranted by the evidence.

The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

and the state of a constant of the second constant is a second of the state of the of

The contract of the contract o

ent if we not two the formal and the vertical and specific transfer and a second secon

på gåring dand ta medne med sedige ed tre tredenk bill

39028

ROSS D. NETHERTON et al., Appellees,

VS.

VIVID, INC.,

Appellant.

19

APPEAL PROM CIRCUIT COURT OF COOK COUNTY,

289 [ 4 61]

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This suit was begun in equity by Lckenna and Metherton to compel the specific performance on the part of defendant, Vivid. Inc., of an agreement to convey certain stock in the Vivid company and pay to the plaintiff's certain sums of money as agreed. The bill was filed July 17, 1933, and alleged the employment of plaintiff's by defendant on or about October 1, 1931, by its then president. Flanigan, to find an organization financially able and willing to enter into an agreement with Vivic, either for additional capital or for the purchasing or leasing of its business and rights under certain patents, for which defendant agreed to pay reasonable compensation; that on or about that time plaintiff's began regotiations with L. C. Smith and Corona Typewriters, Inc., of New York, and that after spending several months time. on or about April 9, 1932, an agreement was consummated between the defendant and the Smith-Corona company, under which Smith-Corona purchased the entire machinery and other factory equipment of defendant, and its entire inventories of duplicating machines and supplies. Under the same agreement Vivid granted to Smith-Corona the sole and exclusive license under its patents and applications therefor, for which Smith-Corona agreed to pay defendant a royalty of 5% of the entire net sales of all new duplicating machines and rolls; that Smith-Corona agreed to pay for the entire inventory of duplicating machines, etc., of defendant in cash

groupe and all the second

## The Mark the second of the second sec

in A contract of the contract Profit and the same of the field of the set of the and a subject of the property of the control of the rain it has alway a damen a trib or an inches attaches and would find the limit of the first of policies to - if Is a location, then we we had been a good affective of . Is a final distribute of the solid out the world which maneral barrar was a least to agree of their take there is no - Commence the control of the contro the thing grows it who, we are greated businessisted and responsible intertob of their out, and its contact and boards of measurables and in the Corona to cut and dichasive lisease as or 168 e thick at the plications recreation, for raidad builth-correct or as pay defrance guist sident of mean the assets who called that to be to the paid on a larsai .. one and you so hear, amore-with this fallow to marked in a second of the little of the party of the contract of the

within 30 days after the contract; that on wares 25, 1932, defectant. by Flanigan, offered and agreed to pay plaintiffs for the fair and reasonable value of their services \$5000 each out of the first moneys received from Smith-Corona, together with 375 shares of the no par value capital stock of Vivid to each of the count singuts. the certificates to be delivered immediately after the execution of the contract; and further to pay plainting hetaerton 5000 on account of legal services rendered by him up to the time of consummation of the contract. Plaintiff's agreed to accept this offer. March 25, 1932, a special meeting of the stockholders of defendant was held pursuant to notice, at which nearly all the stockholders of defendant were present either in person or by proxy, when a resolution reciting the valuable services of plaintiff's to the comporation and directing and authorizing the directors and officers of defendant to carry out this settlement, thereby ratifying and confir ing the agreement, was passed. June 2, 1932. Smith-Corona paid defendant approximately \$45,000 and has since paid other large sums as royalty; that defendant paid to claintiff (c-Kenna \$3000, and that there is a balance due of \$2000; that defendant paid to plaintiff leth rton \$5500 and there was a balance due him of \$4500, on account of his legal services, but defendant refused to make further payments or deliver the stock; that the refusal was vexatious and unreasonable; that complainants are entitled to pay ent it interest at 5, from April 9, 1932; that all the issued capital stock of defendant is owned by a small number of persons and there is no open market in which it may be purchased. The value thereof cannot be easily ascertained other than from defendant; that its value depends upon the performance by Smith-Corona of its contract; and the damage to plaintil's by defendant's breach cannot be accurately ascertained; that defendant ought

within CD tage Libra the emilyanet; but no consider the last tage in a by Flaniger, offered and a great transportation to the Flan intelligate to the open burd or inter alout to cuter of compare e... To got us 875 stat to as all gamera - Bleet motal fortent two out , du marke do mil to o mor vivid to move intimes molec<mark>rate or</mark> -And is said this to an air to serve to positive figure is the cost cum talism of each secretary all their's grown to seem this office. garty that the president of the pullbank interior of this 18 18 tors. o sell agreement to a comment of the wil it emilial is to ancience of the few off initials activities. \*Ifte to exercise the particular formulation of the section of cross of independing the literact for all its configurations for independent and searing the light the tree of the particular frame of the Oliver and a souther to the wife, the second of the second ... This is to the subscript for the gar so such enter AND SELECT THE SELECT OF THE SELECT OF SELECT OF SELECT SELECT SELECT OF SELECT OF SELECT OF SELECT OF SELECT Trains & anter the observation was a secure december of the rest with a research dar hartet ing gaselvres implicit to daneer as , a dar he did att The state (2000s one of the class to assembly the intellection of the effect -us or estimated and substitutes to testion and auditory con despise tiped to expense its items at at from Abril 9, Isha; the all In the multiple a gai here of our one too to docte is fore terms i and persons on the property is no open thirty in that it say be naroussed. work most marte contactions yilliar of tennes there. I endow est desired at; but the volue fer not upon the perfer a ce by balt ... ation with the contract; on a read the state of the state of the same of named American Land (Strong Property Diving the 16 Lands Strong therefore to be compelled to specifically perform. The bill prayed accordingly. Flanigan was made a party defendant.

Vivid answered admitting that it desired to enter into negotiations for the lease or sale of its patents and rights, but denied that plaintiffs or either of them had been employed to find a business organization able and willing to enter into an agreement with defendant: denied that it agreed to pay plaintiffs or either of them any compensation therefor, except that Flanigan alleged that he with other stockholders of defendant on May 22, 1931, entered into an option contract with plaintiff : caonna by which bekenna was to have a 60 day option to purchase all the stock of Vivid for \$1,000,000; that tois option was given in order to sermit ackenna to negotiate with one Walker, and turough Walker with the International Business Macaines Corporation; that Metherton was employed by McKenna at Lchenna's own expense and not by defendant. chenna did not exercise his option which expired by its terms and was never renewed. Defendants admitted ketherton was licensed to practice law but denied making a contract with him for legal services as alleged; denied that as a result of the efforts of plaintiffs the agreement of April 9, 1932, was consummated between defendant and Smith-Corena, but said that such an agreement was in fact made on that date, which was negotiated by Flanigan and one ichally for defendant and by Dean Babbitt and Fowler Lanning for Bmith-Corona. and that the complainants in no way participated in the negotiations leading up to the contract.

Defendant admitted the receipt of \$45,000 subsequent to April 9, 1932, and other sums for royalty; admitted that betherton advised defendant during negotiations as its attorney, but say it was not in accordance with the terms of any supposed agreement with betherton and makenna, and denies that plaintiffs were entitled to any sums other than betherton, who was entitled to reasonable

filit vil . . for a parallilate ter cortillate in the parallilate of a parallilate of the cortillate o

Light on the second of the sec

Such to with of an a calmoldary of extended as may if, N. s., ander & into a police de abreca cila pirtuita o acassa by reida a case as mis divi. To real about the sections of moisso yet as a sweet of which a first of refre allows, are ablee allowed that the first wayroldin is will within intermed and the one old sections as Translation of a notaer that unit ; as lataborate profit out and classic Lands The following the escential with energia and the property of the contract of tan in the start all ( leadent dale . Riche al estimate for file er. To we was noted and appropriately to be about the standard because there is tice last that the last contract that the that the tack the at done, by he sarethe end to clear a de real Asimal (bagelle as the agreement of Lorda t, Vall, was common and his our ball of the and independently but and, for one of greaters will free after with with the second of the district of the action of the contraction property will be take the for the contract of the statement and the take the tendent ⇔plouse, era el habrisoliana apro on al ratural force du dest tea s leading no be entroci.

compensation for legal services. The answer also denied that any agreement was made March 25, 1932, to pay ketherton and ...chenna \$5000 each or to issue to them 375 shares each of defendant's common ca ital stock without par value, or that they agreed to pay Netherton \$5000 for legal services. The answer admits a special meeting of defendant's stockholders was neld .arch 25, 1932, that a resolution was passed substantially as alleged, but denies that the resolution had any binding force or effect; that the special stockholders' meeting was called for the purpose of authorizing the board of directors of Vivid in general terms to enter into a contract, but that the stockholders of defendant company had no right, power or authority to enter into or ratify any contracts with complainants, and aver that at no time did the board of directors of defendant ratify, approve or affirm the resolution or consent to be bound by it; that the resolutions in question were drafted by Netherton; that when they came up for the stockholders Detherton stated that unless these resolutions were passed he would block and prevent the execution of any contract between Vivid and Smith-Corona and walked out of the meeting; that on that date no contract had been entered into between Vivid and Smith-Corona, and the officers and stockholders of Vivid feared that Netherton had the power to block and prevent the execution of the contract and would do so if the resolutions were not adopted, and in such belief the stockholders permitted the adoption of the resolution. There was then a disastrous basiness depression in the United States. Defendant was heavily indebted and defendant beliaved that if the demands of plaintiffs were resisted the contract with Smith-Corona might be defeated and the financial stability of Vivid endangered; that the resolution was extorted from the stockholders by threats and duress of plaintiffs.

The answer admits that on June 2, 1932, defendant paid

gar and film, ru, area in the least far are area and more were the mark of the first star and decembers to former general as an even a war, den el conta fort de morden ou will bu where sil , the large A. I had the J. alter with the and the control of th for the property of the fact of the force of the force of the fact omes for We to posse he als you are apiecalled in the author La electric and materialist, puriquist was tamphic stocks in income and as a constitution of the c Autoria de de la contraction d wisks a no cost nearest to the contract of the contract is a finite of the contract of the con tion of on it data that one jet with decree if the adoptions who erd tol - commo josé notre de di partente la religione et religione. arem amidinica a parma sasi . Jesă habas suiza de arabicaticate page of he would bleet and sevent of a market had been and an energy then : quistem and le the 'estat on market of law fivit provied fir: Ithi accurate otal heres a seed in it describes on each task so delicit + Orrows, as I so all'isers con acoustics as I say, second the control of is nelico so one interes for intell of there is induced by .Acimele den eur augithremen ent it no et himer ion doutine est reget ties. Ourse sys ties through a catalant and the repaired in the critical desirable will the resulting the state of the desirable want our injuing aroughlists in to absolut out it tood for lief tries with the later and the terms of the call the first sent stability of Visio and majored; and the man ention on abores. Tribul L. to escue! has alsowed by saile bloods out work the anemer adulte that on June U, 1932, defouture oul,

ton unless payment was made he contract with Smith-Corona would be blocked. At that time the contract had been carried out in part only, and there were still many ways in which betherton could carry out his threats to block the deal. The answer also admits that on June 2, 1932, \$5500 was paid by defendant to Netherton, and alleged that it was paid by reason of similar threats. The answer admits that defendant has refused to issue the 375 shares of common stock to either of plaintiffs; that there is no open market in which it can be purchased. The stock of defendant corporation is held by 28 persons. The answer also averred the contract could not be performed by reason of the failure of defendant's board of directors to pass a resolution fixing the consideration for which the stock might be issued. The answer denies that plaintiffs are entitled to the relief as prayed.

The cause was referred to a special commissioner who reported finding the equities with the plaintiff's, overrules objections filed to his report, and the chancellor also overruling exceptions thereto by defendant, on may 14, 1936, entered a decree sustaining the findings of the special commissioner and decreed that Eckenna recover \$2000 with interest from May 6, 1932, at 55, amounting to \$2401.89, and have judgment therefor; that Retherton recover \$4500 with interest at 55 from May 6, 1932, and have judgment for \$5404.34, and that within five days from the date of the decree, defendant (through its duly authorized officers) should issue and deliver to Eckenna a certificate for 375 snares of the common capital stock of no par value of defendant corporation, fully paid and non-assessable; and that similarly it should issue and deliver to Netherton a like certificate.

The cause as to John J. Flanigan was dismissed and the court retained jurisdiction for the purpose of enforcing the decree.

northed finding to entities the ristriction of the properties of the finding overties of the position of the filter of entities the ristriction of the filter of entities of the filter of the filter

and the familial and maked by more as a some our

The record in this case is voluminous, containing almost 2000 pages with 126 exhibits.

Defendant urges that the decree should be reversed because, they say, plaintiff's are in court with unclean hands; that the alleged contract, by reason of the fiduciary relations of plaintiffs to defend at corporation, is presumptively frameulent, becing secured by threats of Letherton as attorney while the work was in progress: that plaintiffs are not entitled to specific performance because the contract was not inir nor free from oppression nor made for an adequate consideration; that the agreement to issue no par stock was void because the board of directors had not by resolution fixed the mone; consideration for mich the stock should be issued; that a court of equity will not direct a board of directors, who is not a party defendant, to exercise its discretion in evaluating the stock, and that so to do would violate the pre-emptive rights of other stockholders; that since there was no basis for specific performance of the contract, the court of equity was without jurisdiction to give other relief, and that the court erred in allowing plaintiff's interest apon the amounts found to be due to them. Also, the defendant complains in this court for the first time that fees allowed to the special commissioner were excessive,

In summary, the facts found by the master are that on October 1, 1931, defendant was an Illinois corporation, engaged in the manufacture and sale of duplicating machines, equipment, etc. The corporation desired and very much needed additional capital. The great depression was under way, and if additional capital could not be obtained it was desired to lease or sell certain of defendant corporation; Robert P. Quinlan its secretary and treasurer, and Flanigan, Frank P. Lavin, Edward E. Mchally and John J. O'Leary,

tope Tourist of the experience of the experience

and the control of th and in progress; rick particles for more within the first war active was more than and and it can now we would not come. A seminational western with the first manner of the second second to the first most mediane to rangaril in tracition was sent the terminate of more of anna bed cold reactions sited the nearly deal in the reliable to : pearly for this grange is drawn a family and bluer's deads Posts of threeless, who is not a property to be east to Tiper of crosses on the character add guitable to ut nelected in att riologie vice agressive right of color characters and which teams was no oncits for specific partom and at one concerns, sin-Im. , Initian as so bet or anishibeling smooth as gaine to especial. telt nour samescal a'difficiale gaiwells of became orne one said emeanor Town to be the to them. At a, the seriouseest countries Annance the of the piece of the ends during the rest of the state of considering with and accepted,

opening i, it is find and in the course or receive, we take on the course i, it is it is an interest or a course or received and in the analysman or and selected or and the course and the course or and an estendial course in a course or sometime and an estendial course or course in the course or and the course or and the course of the c

with Quinlan, constituted the board of directors.

Plaintiff McKenna lived in Wisconsin, was a real estate dealer and a close friend of Flanigan; Netherton, an attorney and friend of McKenna. McKenna also was a stockholder in the corporation. Netherton acted as the attorney at the organization of the defendant corporation on September 30, 1927. Its capital stock consisted of 500 shares preferred and 10,000 snares of common stock without par value. The original certificate shows that Quinlan subscribed for 998 shares of this common stock; P. C. Griffins and Frank P. Lavin 1 share each. Ackenna and Netherton were employed to secure the new capital desired, and on May 22. 1931, to that end &cKenna was given an oution to buy the capital stock. If the plan was successful, it had been agreed that LcKenna and Netherton should each receive compensation to the amount of \$50,000. No deal, however, resulted. Later in the year McKenna, Netherton and Wlanigan had conversetions and correspondence about a contact that betherton had with business prospects in New York. Betherton, representing defendant, opened up negotiations with Dean Babbitt, representing the L. C. Smith-Corona Typewriter Company. As the negotiations progressed during the fall and winter of 1931 and the spring of 1932, the question of a definite agreement between defendant and LeKenna and Netuerton as to the compensation to be paid to them in case the negotiations were successful was considered. Uctober 26, 1931, Flanigan wrote McKenna that he told Netherton that the deal was still in the hands of McKenna, and that Metherton was simply to act as contact man. Flanigan was informed at that time of the contact of Wetherton with Dean Babbitt. After various negotiations an agreement was executed and signed by defendant and the Smith-Corona company on April 6, 1932. The master Tinds that the agreement was consummated through the efforts and

•

portions can be a controlled parallel and parallel and the parallel and the controlled an Sur grade the gradient and purpose to the sint reads of the mediate ercou los il unfilpración en com la fala a compre. Long fallo farillo Is form to be forth as a section of the feet to be 1 to the government shifts on the control of the Company of the control of the is to get all paties are not a second of the contraction and sea the first the control of the control tion to we expend of highle a dong they when meaningen - risymbe for monitoril factorists and classification conjugate in the decidence of the confusion of the con that here more thank that does not bould be a recommon to the india en irogo di basa liene. Lendiumon, recreso una delimbeter, commend as as a timeless mission beind but a superior and a s to appropriate a 1880 to the test to 100 to the paint for another ATOT, the secretar of a fall for a personal series, paying pages, and redicted to the first the contract of the cont to the a meaning plan or and may be lotted inche, will get par a groupped du coller possible for production for the production of the continue to at the second of the second england action . Its ideast need notice nesten in the Section of the the Latek of Bourie ? - Bourson a san distance of a comit distance and the results on: . While the true in the part satisfies while the said that the strate and Alpharia has a rando see terminage and tand

services of Netherton as contact man for McKenna, who was in charge of the deal at the direction of Flantgan as president of the defendant: that Letherton and Planigam reached an understanding that \$5000 in cash and 375 shares of stock was reasonable compensation for the services of netherton in promoting the deal. and that \$5000 was a reasonable compensation for the legal services of Ketherton. March 25, 1932, Manigan and acculty representing defendant, and Lowenna and Betherton had a conversation about the compensation for services, and reached an agreement which was put in the form of a resolution prepared by Letnerton and which was submitted to a meeting of the shareholders of Vivid and was unanimously adopted by them, as set up in the bill. The master found that while the resolution might not be binding on the corporation, it served as a distinct proposition and consummation of the negotiations for the amount of compensation and states to the officials of the corporation the compensation which was expected by achenna and Metherton. After the adoption of the resolution the officials of the corporation continued to accept the services of ackenna and metherton in completing the deal between defendant and Smith-Corona. The master also finds that defendant has already realized 194,000 in cash from royalties and from the price of its equipment and stock sold to the Smith-Corona. The master finds that the services rendered by McKenna and Metherton were at all times well known to Flanigan and were rendered at his request.

hotwithstanding the facts as found by the master and approved by the chancellor, the first contention of defendent is that plaintiffs should not be allowed to recover in a court of equity for the reason that they are in court with unclean names, in that they had deliberately sworm falsely as to its material facts in issue. The specification on this point is that plain-

Þ

٠

AL NOT OUT , HE OIL VOL AND TO LONG OF ANYOUND IN HOST WHO To be bloomed as an included to and compare to him you a seguistic - and determine the first terminal angles for a second resident of the discharge of the with the above them the subtriction of the company that the state of t ar Jerraran . See sure up a ba ana van lan , and a feb advece with an indicate etc, we have him he movem it gire interces on the specificone, come a serie con come a commentation and a commentation of the comment of the comme wilegar aregulates of the test bestiner with each san to be to dead and the fire Monse has shouldings soll to spine and man't our point Intio-Cornin. the cales thid that the reriies reniesed by restinging of around ifor and it is an early noted for the same of

sobmissionaling the four stands to the sesser and enterprish to the sesser and enterprish to the content to the sesser is a sesser in a sesser of coulty to the vesser into the test of the court standards and the test of the test of the sesser is a sesser in a sesser in the test of test of the test of test of test of test of the test of test

tiffs based their case on the theory that in July, 1931, Flanigan provised that the same contract would obtain with reference
to the Smith-Corona as had existed in the International Business
Lachines deal. Schenna and Letherton both testified that Fl nigan
said to them that their compensation would be the same in the new
deal as it was in the International deal, - \$50,000 on the basis
of \$1,000,000 deal, and in proportion if the sale price was less;
Netherton to get the same. Defendant says that such a promise
was impossible since Flanigan at that time did not even know the
name of the prospect; it also says that it is shown to be untrue
by letters and documents, as for instance by channa's letter to
Netherton of December 2, 1931, in which as said, "I would advise
you to have an understanding as to our commission before going
into this deal."

McKenna's letter of March 18, 1932, to Flanigan in which he bitterly complains of unfair treatment and of rearks made by Flanigan to him in his room at the hotel, "after I told you what I wanted as my commission"; hetherton's letter to men-nna of October 26, 1931, in which he said in part, "As I told you, nothing definite has been arranged with regard to your and my compensation if such an arrangement is put through." He says that if he is to look to the L. C. Smith company for his compensation, he would like to know it so he could make arrangements with them. hetherton's letter of February 1, 1932, to reasona, in which he said it was essential that McAenna should come quickly and get everything straightened out with Flanigan, and that he wanted a definite and complete understanding before the end of the week. This point is so earnestly presented by defendant that we have given it careful consideration. We are satisfied, after reading the entire record. that the charge is wholly groundless. Assuming the conversation with Flanigan to be as ackenna and betherton said it was, the

First and the control of the control of the color, the color, and the color of the

esemble letter of track to this, to this and also is things, our miles of multie transcence and of the relations of ents. To school to a wint of a factorization (freing) and the between I marked by the compact of the second of the formula and for a fill that of the lift days of the pure of the property and the community was come the to look to the to the to middle of the classical and the look at the se know the court of the state of the second second ton's leader of ediracty A, Arel, to Loud., in the tion we did it gal igners log has glablet dans bloses market him leitmane sew or of the a force of the gradient side one benestablished 2) this airs , which has a live but braites with detains advisors the months of the contract of the contract of bedrooming which increase consistration. In one satisfied, ather proving the critica arasel, that the overge is molly propalest, we wing the conversation one car of these medicates and the same as the not sell int.

came so different in its nature that such a conversation could not be construed to amount to more than a basis upon which to charge for plaintiffs' services upon a quantum meruit. As the sequel showed, there was every reason why the agreement as to the new deal with Smith-Corona should be made definite, complete and put in writing. The correspondence, rightly interpreted, means no more than this and is not at all inconsistent with a conversation, as testified to by plaintiffs. The charge of perjury is not justified on this record and should not have been made. The master apparently did not record this alleged or at conversation as testified to be an additional and the been made. The master apparently did not record this alleged or at conversation as the testified to be a described to the master apparently did not record this alleged or at conversation as the testified to be did not record this alleged or at conversation as the testified to be described to the did not have been made. The master apparently did not record this alleged or at conversation as the testified to be defined to the description of the charge simply illustrates the bitterness with which this litigation has been conducted.

Defendant contends in the next place that Netherton and Mc-Kenna were fiduciaries of defendant, and toat the transaction by which their compensation was fired was, therefore, presumptively fraudulent and void. Defendant cites Convercial kerchants Bank v. Kloth, 360 Ill. 294, and Wagerwan v. Schulte, 349 Ill. 11. While the cases announce an undoubted rule, we think they have no soplication here. Certainly not as to McKenna, who stood in no fiduciary relationship to defendant in so far as the negotiations with reference to the compensation which he was to receive was concerned. Netherton, it is true, had acted as attorney for defendant in some matters prior to the time when he was engued with chenna in natters connected with securing additional capital for defendant, but his services as at orney in those matters had been closed before the beginning of this promotion. It is true that in the course of his negotiations with the Smith-Corona people services of a legal nature were performed, but the evidence shows without contradiction that Flanigan and other cificials of defendant corporation had full knowledge of the situation. All of the services were contingent

1

everies appropriate to a solution of the contraction of the appropriate of the contraction of the contractio tjá Massassant við stom þar þar þar til eð leg keltullurðik tilað kæru giornion salvas , septentino, , and solito per operations who a particular Ad America bette ett en Adel Kall giv sature som forten og te te tar det des S That's and the the commence of the control of the c -ither or over gold shill be path that the standard move the contra duction derivations to the contraction of the no other was to no other. erior annicessories en a l'estat factail à estationement and reform to the company which we have saying received the wind and Anteron, 15 in that the contract of the contract part of the contract of ers out some principal and security and secu to , in the total color of the state and the first state of the first state of the that ar Becoke are a final success of the granteria as anothers ald nempo, od id tour spatial to . origonome shit to . it iss such im al a lo s wivers one of anever-usi a all isto empiritare and to mette Bartime January in the artist for the providing new against first has helder comes suggested to adplication made was anging to had day little of the elterities. It of the services one continued upon the procuring of the contract, and no one could have thought that Netherton was acting in a confidential relationship in taking measures to secure the payment of his own compensation. The rule which prevents an attorney from purchasing an interest in the subject matter of litigation from his client and makes any such deal on his part presumptively fraudulent has no application under circumstances such as here appear. That rule is intended to prevent fraud, not to assist debtors in evading their just obligations.

It is next alleged that the contract between plaintiffs and defendant was void because procured by threats while the work for which he claimed compensation was still in progress, and that it is void for that reason. Defendant cites soyle v. read, 136 111. 153: points out that Netherton began serving the corporation as attorney in 1927, conducted its defense in an important litigation which was in progress until June 8, 1931, and that in February. 1932, when this arrangement was made, he was engaged to draw the contract between Smith-Corona and defendant. It says that on March 15, 1932, and again on Larch 25, 1932, he demanded compensation under threat that if it was not paid he would block the deal. and that he was aided and abetted by Eckenna. Defendant complains that he had a secret arrangement with Babbitt of Smith-Corons to prevent the deal goin, through until his confesions were provided for, and defendant says that under such circumstances an attorney is obligated to show the reasonable value of his services, and that as McKenne's position depends entirely upon metherton, it is incumbent on both to show that Natherton's services were worth \$15,000 and 750 shares of stock; that the record does not so show but is silent as to the actual value of Netherton's services. Defendant quotes at langth from correspondance between Letnerton and Modenna, which is in evidence, in which Letherton suggests that it is only good business to get a written assurance from

The street of a man, or in a new ord, a number of the contract of the distance of the distance

4

the graduation of the substitute of the substitu set Brent . I had no hours by a solo, at we had him, but ford relati . As to a fitting, the feet and to tast which is amoved to be not be weak which the formation is an about the last to the property and which and the transport of the control of when no in the a law of [25] I got for the unit of in [0001] if board and the comparison is the second of the second of the more experience of the comparison of the compari or carriers las as \$22.16 as \$200 de a note écroper de la colonia a the river that are related to be all the appears of the units of the contract impression of the sign of the second control as controls sections to the controls appeared about 10 to 10 Ho, to and 700 or see of stoods to the terms of the boundary terminate at not we have the print for each of the terminate for Audrevân . Nevales de ... pagairno arrit di sed de equese publicates and sciences, wile-initality of a maker setmenter, sagger to wer't se wasens applite a few of secondary less, give at it land Flanigan, etc.

We are not impressed by these contentions. In the matter of promoting this deal and in the matters concerning which Netherton wrote accenna, Nethertor was not sound, as the attorney for defendant but as the partner of mcKenna in properting the deal between defendant and Smith-Corona. It is true defendant employed wetherton to act in particular matters such as drawing the contract, etc., as its attorney. Whother it was wise for defendant so to employ him or he to accept the employment may be a question, but both parties acted with their eyes open. Netherton had every good reason to suspect, as the sequel shows, that an attempt might be made to beat both him and McHenna out of their commissions, and the observations of Metherton to McKenna have been abundantly justified by subsequent events. There is no proof in the record tending to show that Netherton did not give loyal and efficient service. It also appears that as a result of his endeavors the deal was closed and defendant corporation put in a financial situation perhaps as advantageous to it as if the original deal had gone through, in which the co pensation would have been \$50,000 each to the plaintiffs.

As the deal approached completion the suspicions entertained by Netherton as to the manner in which plaintiffs would be treated was confirmed. The only threat made was took he would withdraw from his connection with the nation. A constul consideration of all the evidence leads us to believe he would have been entirely justified in doing so.

The minutes of the stockholders meeting recite that a general discussion with regard to the compensation to be paid to

Natherton and helenna was had before it was voted upon. Two weeks

later Flanigan wrete to letherton a letter in which he ad ressed

him as "Dear Ross" and enclosed a copy of the stockholders'

arr , united

The Table of the State of the Company of the Company of country where are not able to a first two there side qualiforning the apareira resse du la lucio de la compacta del compacta de la compacta de la compacta del compacta de la compacta del la compacta de la compac was the entire to the control of the arabbetta and the state state of the state of pai wing has nown be disan en woldern . I sen el wegen des bagole ernilat val mahr de il modre . . pernir de si un , din , son miner is to the material of the little of the field of or in the ಕ್ರಾಮ್ ಕಾರ್ಡ್ ಪ್ರಾಥಿಕ ಕ್ರಾಮ್ ಸ್ಥಾಮಿಸಿದ ಪ್ರಾಥ್ಯ ಸ್ಥಾಮಿಸಿದ ಮುಂದಿ ಮಾಡುವ ಕ್ರಾಮ್ ಕ್ರಾಮ್ ಕ್ರಾಮ್ ಕ್ರಾಮ್ ಕ್ರಾಮ್ ಸ್ಟ್ರಿ and the contract of the contra zi na la run el a los literalistas, a superiorista en el tribo de la los desentes. area ball and at a colorie to applicate and it has been been es el escol call se l'inne elle ve l'illiant lunctuille es e arty for all a to the term now or highly of brooms out at those is alread than so, . which is not all included the british for final ter arisino are the large to topos, were find the expension will tuner negacin, , or all action its control bear had look tend its Laye bean (6), ). O enc . to the old intities

as the deal content of content of the factor of the first of an take at the first of the factor of t

- m. p. p. 1 halo at judicent explications of the selection of the per per distribute of the continuous of the continuous the continuous of the continuous o

resolution of March 25, 1932. Defendant thereafter in the course of the deal furnished the Smith-Corona company a bulk sales affidavit in which it listed Netherton as a creditor for \$10,000 and McKenna for \$5000. A month later the corporation paid Netherton \$5000 of the amount and McKenna \$3000. Six months later Setherton was paid \$500 more. Long prior to that time the contract between defendant and Smith-Corona had been fulfilled. This conduct of defendant's officials is wholly inconsistent with the idea that the agreement was the result of threats. If there was any element of that kind in the agreement as to compensation, then defendant did not within any reasonable time repudiate, but on the contrary continued to request and use the services of Netherton in the completion of the deal upon which its further financial stability depended. We think the charge is without any foundation in fact.

Defendant contends, citing many authorities, that the court should not have granted specific performance because the contract was not fair and free from oppression, and the consideration therefor inadequate. In view of the actual situation which we have recited, the needs of the corporation, the former definite agreement, the actual financial situation, we are not able to entertain a doubt that the contract here in question meets all requirements and is not subject to these objections. The whole record indicates that plaintiffs at a critical time and with much labor performed services for which, under all circumstances, the compensation allowed to them under the terms of the contract is comparatively small: We have given not only careful attention to the report of the master but have read the entire abstract, examined the exhibits and considered carefully the suggestions of counsel in the matter. The conclusion forced upon us by this examination of the record is that this defendant was willing to

Alter a stilling to the constant and like the constant and the constant of the constant of the constant and the constant and

description of the production of the coling of the colon and also as the colline of the colline

accept these valuable and important services while using every legal subterfuge in order to avoid paying therefor. The defense, in our opinion, is purely vexatious.

Along this line is the contention made that the contract to issue this stock of no par value is void because the consideration for which it is to be issued has not been fixed by resolution of the board of directors of the defendant corporation. The contract was executed march 25, 1972. At that time the General Corporation act (in force July 1, 1919 - see Session Laws of 1921, page 965) was applicable. It is suggested by defendant that the agreement was void under section 32 of that act. (see III. Business Corporation Act Ann., page 61%.) The corresponding section of the present Business Corporation act is found in IIIi-nois State Bar Stats., 1935, chap. 32, sec. 17, pages 852-53.

Section 32 of the General Corporation act of 1919 provides:

"Subject to provisions of this section, the corporation may issue and sell its shares of stock having no par value from time to time for such consideration, not less than five nor more than one hundred dollars per share, as may be prescribed in the certificate of incorporation or as from time to time may be fixed by the Board of Directors, pursuant to authority conferred in such certificate."

The charter of the defendant corporation did not fix the consideration for which no par value common stock might be issued. The board of directors have not held any meeting at which they have fixed the express consideration for which the transfer of the 750 shares of no par value stock might be made. Defendants cite Triolex Shoe Co. v. Rice & Mutchins, 17 Del. Ch. 356, 152 Atl. 342, 72 A. L. R. 934, to the point that stock thus issued without a precedent valuation by a board of directors is void. That case was decided, however, under a statute essentially different from that of Illinois, and also under circumstances which were not at all similar to those which exist here. The case is not applicable.

then, tide that the court of the second to the second to the continue of the c

the observed of the new year value common stock might in issued, consideration for which we get value common stock might in issued, the beard of directors have not null engine at his consideration for which is not that the convest scattles that the value sout his value is one cater of no over value sout his to the rate. Confinents one with the constant that the constant standard of the constant standard without the pracedant valuation by a moort of discuss is veta. That constant standard constant standard of the constant of the constant

We do not understand that the issue of this stock by defendant will make necessary an additional sutnomized capital structure. Defendant says:

"Complainants' suit is to compel Vivid to issue 750 shares of no par value stock. Vivid owned none of its own stock; it did have more than 750 shares of unissued stock authorized by its charter, which stock, under the Corporation Act of 1919, the board of directors had power to issue for money or money's worth for a consideration measured in dollars to be fixed by the board. Under the Corporation Act of 1919 this stock could be sold only for money or money's worth; it could not be given away or traded for blue sky. It was merely potential stock which the board of directors had power to sell at a price to be fixed in their sound discretion."

In Roberts a Schaefer Co. v. immerson, 515 111. 1.7, the Supreme court of this state, construing section 32 of the General Corporation act, said:

"As we construe the General Corporation act, the statement of incorporation may specify one or more of three types of authorized stock issues: (1) Par-value stock, whose par value must appear in the statement; (2) no-par value stock, upon which a value is prescribed in the certificate of incorporation; (3) no-par-value stock whose value 'from time to time may be fixed by the board of irrectors passaunt to nuthority conferred by such certificate.'"

As we understand the record the stock here to be issued to plaintiffs is of the third class above described. It will be noticed that the fixing of the price is not made a condition orecedent to the transfer of the shares. The directors of the company may fix the value from time to time. We will not presume that the board of directors will fail to perform its duty in this respect whether that duty is viewed from the aspect of present or future creditors of the corporation under the trust fund theory; in relation to its effect on other steek of ers who may have paid more for their stock; or from the standpoint of the public policy of the state.

The arm of a court of equity is not powerless in such a situation. The decree reserves jurisdiction necessary to its enforcement.

-vicini acesa má librica en la la paracama reculto con al

6

Properties and a street of the street of the

the first and the contract of the second of the second

Approximate of tills there, will as done to a minute of the mark

The same of the sa

to see the construction of the construction of

is to the second of the first of the control of the second of the second

a .ess ni nosina es ser si quiase to unro e te ententente esti es entententente esti es entententententententen

We do not understand that the power of a corporation to issue its stock in payment for services is questioned. The decisions hold that it has such power. Farvell v. Great Western Telegraph Co., 161 Ill. 582; beven ort v. Piano Taplement Co., 7. Ill. App. 161. Ill. State Bar Stats. 1935, chap. 32, sec. 18, page 853; Ill. Business Corp. Act. Ann., sec. 18; Fletcher Cyclopedia Corporation, vol. 11, secs. 5155 and 5187; vol. 57 American Law Review, p. 233. That specific performance is a proper remedy for wrongful refusal to issue stock, see Fletcher Cyclopedia of Corp., vol. 11, sec. 5165, page 333.

As we see it, the duty of the board of directors of defendant corporation to fix a price does not in any way affect the
rights of the parties to this proceeding at this time. After the
stock is issued it will be the duty of the board of directors,
under the statute, to pass a resolution fixing the price for which
it was transferred and transmit the same to the proper authority.
As already stated, the decree reserves jurisdiction in the court
for the enforcement of it.

Since we have found plaintiffs were entitled to have the contract specifically performed, it will be unnecessary to discuss the point raised by defendant that the court of equity is without jurisdiction. The further contention of defendant that the decree erred in awarding interest need not, we think, be considered. We have already expressed our opinion that this defense is of a vexatious nature, and at any rate the awarding of interest in a court of equity identities on equitable considerations. Chicago trick to. T. McLester, 165 Ill. App. 114; Colden v. Cervenks, 278 Ill. 409; Duncan v. Datey, 313 Ill. 5... There as no reversible error in the amount of compensation awarded to the special compissioner.

The decree is affirmed.

AFTIE ED.

Le la servición de la compania del compania de la compania del compania de la compania del compania de la compania del compania de la compania del compa

As we see see it. . erice of the cost of the cost of tractors of trained.

Let as represented to the expension of the cost terms of the cost of the form.

The cost terms we will be cost of the expension of the cost of the terms, and the terms of the terms, and the terms of the terms of the cost, and the cost of the c

Sirge on it me to all the contract of the cont

Pouritts of someth rule

. . .

39193

TINA ORTGIESEN, Plaintiff,

VS.

CHICAGO TITLE AND TRUST COMPANY, a corporation, as successor trustee, et al., Defendants.

Company, a corporation, as successor trustee, E. G. SWANSON, R. J. PFORDRESHER and E. MERTENS, not individually but as a bondholders' protective committee, WILLIAM A. LOMAK, not individually but as trustee under trust ho. 396, RAYBOND J. DOWERY, as trustee under and by virtue of a trust agreement dated may 10, 1935, ESTHER M. O'BRIMS, PALL SCACCHI, ANY REZZONICO, ROSE QUILICT and JOHN REZZONICO.

TINA ORTGIESKN, Plaintiff,

VS.

CHICAGO TITLE AND TRUST COMPANY, a corporation, as successor trustee, et al., Defendants.

On separate appeals of CHICAGO TITLE AND TRUST COMPANY, a corporation, as successor trustee, and RAYMOND J. DOWNEY as trustee under and by virtue of a trust agreement dated May 10, 1935, ESTHER M. O'BRIWN, PAUL SCACCHI, MARY REZZONICO, ROSE QUILICI and JOHN REZZONICO.

Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COURTY.

I.A. 611

APPIAL FROM CINCUIT COURT OF COOK COUNTY.

Gen. No. 39204

PR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

These separate appeals have been consolidated for hearing in this court. The first appeal is from an order entered on June 23, 1936. The appeal from this order is taken by the Chicago Title and Trust Company, successor trustee, under a trust deed recorded as document No. 9645152. This order recites that upon the petition of Francis E. Cash and Morris Blank, attorneys for Tina Ortglesen and Leus Lagus, her Molders, praying for allowance

A STREET WATER

e de la companya dela companya dela companya dela companya de la c

ATTENNESS OF THE PARTY OF THE P

447

me a digital and a company of the property of

មាន។ ប្រើប្រ ប្រើប្រើប្រធានក្រក់ក្រ ។ ១៦៩ ២ប៉ែ បាន សេខស្នាន់ ( សេខស្នាំមា 5១៤០ ) ប្រែប្រាប់ ប្រឹក្សា ប៉ុន្តែ ប្រឹក្សា ប៉ុន្តែ ប្រឹក្សា ប៉ុន្តែ ប្រឹក្សា ខែការប្រឹក្សា ប៉ុន្តែ ប្រឹក្សា ប៉ុន្តែ ប្រឹក្សា ប្រឹក ប្រឹក្សា ប្ត

for the country to a

The court considers and also that the court of the reful is this court, the dimental is fire to the property of the court of the court

Med catalater and Long Sacia, bond solect, surgite New Legals of

of fees in consideration of services rendered to the estate, the answer of the Title and Trust Company, successor trustee, and the answer of Raymond J. Downey, trustee, the court being fully sawised in the premises after a full hearing (the court being familiar with the services rendered by Cash and Blank to the estate as set forth in their petition) finds that the services were beneficial to the estate; that the answer of one Swanson to the petition should be stricken; that Cash and Blank, altorneys, be allowed as reasonable compensation as attorney's fees for services rendered the estate the sum of \$900, which is directed to be paid to them by the Chicago Title and Trust Company, successor trustee, and taxed as costs against the Chicago Title and Trust Company, successor trustee, "herein to be paid out of the funds and proceeds of this estate."

The second appeal; docketed as 39204, is from an order entered July 23, 1936, upon petition of Cash and Blank, filed Way 5, 1936, also for an allowance of attorney's fees. The petition sets up that Blank and Cash advanced 341.40 for costs and expenses, and that said costs and \$900 for attorney's fees for services rendered to the estate of the receiver, making a total sum of \$941.40, was due to them. The petition avers that prior orders entered on May 5, 1936, and June 23, 1936, constituted Tinal decrees and orays that these orders may be made a prior lien against the property involved in the receivership proceedings. August 1, 1936, the court entered an order upon this petition that the receiver pay to the petitioners said \$941.40 in accordance with the prayer of the petition, and the court finding that the receiver had on hand sufficient funds, and that the sum of 5941.40 theretofore entered therein had been taxed as costs in the estate: that the taxing of the said costs in the sum of

1.0

The modern of the second of th

There is a second of the second secon

. He was the same for the same of the

L - LL - STOT STOT STOT OFFICE ALLE A FOR AN TOTAL STOTE TO STOTE A STOTE AND A STOTE AND

1941.40 constituted iman decrees in the proceeding, it was therefore ordered that EcCarthy, the receiver, be directed to pay to Francis E. Cash and morris blank 1941.40 out of the reats, issues, profits and proceeds of the estate within ten days from that date, upon their executing and derivering to him and the onicago litle and Trust Company, successor trusted, their receipt and release of all claims in and to said sum. From this order the Chicago Title and Trust Company and Asymond J. Downey, as trusted under a trust agreement dated May 10, 1935, appealed. No report of proceedings supports either order. The record indicates affirm tively that no evidence was taken. The sole ground upon which these orders were entered appears from the records and proceedings of the court and knowledge of the chancellor based thereon. The facts summarized would seem to be as follows:

April 25, 1927, Isaac Schor and others executed 375 bonds for the total sum of \$117,500, together with a trust deed to the Madison & Kedzie State Bank, as trustee, securing payment of the bonds. The property mortgaged consisted of a plot of ground improved with a three story brick building, containing three stores and thirty-five furnished apartments, located on the northeast corner of Lorel avenue and Madison street, Chicago. The property has had an average gross income of about \$17,000 a year. Fourteen months later the cancers conveyed the promises to Louis Scacchi and Johanna Scacchi, who took subject to the indeptedness. By various conveyances, all subject to this in extedness, the title was finally vested in maymond J. Downey as trustee. Payments were made on account of principal and interest so that the principal indeptedness was reduced to \$102,500.

Movember 24, 1931, defendants Swanson, Pfordresher and Martens, designating themselves a protective committee for this issue of bonds under a deposit agreement of the same date, actively

The continue of the continue o

The second of the second second is a second second second from the second secon

The EVA letters are not an important at the letters and the control and the control actions and the control actions are also and the control actions are also as a security of the control actions and the control actions are also as a security of the control actions are also as a security of the control actions are a control actions and a control actions are also actions and actions are also actions are also actions are also actions and actions are also actions are also actions and actions are also actions are also actions and actions and actions are also actions and actions and actions are also actions and actions are actions and actions and actions are actions and actions are actions and actions and actions are actions and actions are actions and actions and actions are actions and actions a

Jaro Dez M., 1931, defunirața Amalice., inforânte. initational information in the section of militaria in the section of the s

began the solicitation of the deposit of bonds. Subsequently, on September 1, 1932, an assignment of rents was executed to the committee by the owners of the property. This committee the easter had full charge and control of the property, although the owners remained in possession, collected rents and paid bills.

January 25, 1932, the receiver of the Madison & Kedaie State Bank executed its resignation as trustee, and by an instrument of the same date, the Chicago Title and Trust Company accepted said trust as successor trustee. Defaults then existed in payments due on interest and principal under the terms of the trust deed. However, the successor trustee did not file a foreclosure suit nor take possession of the premises. April 25, 1934, the last bonds of this issue matured by their terms. May 17, 1935, the protective committee entered into an agreement with Raymond J. Bowney, trustee, for the owners of the equity, under the terms of which the property was to be operated by the committee and Downey for ten years. The agreement in part provided that there was in the hands of the committee \$5066.27 derived from the income of the property: that the committee was entitled to take fees of \$3331 (3% of \$102,500) from this sum "for reorganization expense." It specially provided that during the ten year period the committee would receive 12% of the gross monthly income or about \$250 a year as a management fee, and a further service charge of \$492 a year for the committee. Other provisions were that the owners were to occupy two apartments and receive \$1050 a year for managing the premises.

February 15, 1934, attorney Cash wrote the successor trustee that he represented plaintiff Tina Ortgiesen, owning \$2300 of the bonds. He asked that his letter be regarded as formal notice that his client demanded that the trustee proceed to take over the property under the powers conferred by the trust deed for the benefit of all the bondholders. February 23, 1934, the successor

a politic residual such a calibratura aut an activitation per appred

endo esta a ferrar a martire final actività a such a ferrar and apprend

endo esta a calibration actività a calibration and actività activit

the state of supporting the state of the sta end. The contract was selected and an indicator has described as bure conservation of the or them. Then by the place, we have was the very constraint of the second of the figure of the first sample of the figure of the second , which is the contract of the contract in the contract in the exist and had the driver of the grant of the control that it has been been The entropy of the en than a said of the second of the second and second ; gamesting of in highest as a reflection electrical draws that he will be grand) (AND The professional from the AND) where the TISTICS ) Security with the manuscript of the security of the week tigger podažioje on . Tim o moda teli alia našmuj albit leižvamo A series at the great continue income and in the terms of the continue of the The control of the co 

the two is an execution of a continue the transmission of the antitraining of the continue the continue that the transmission of the continue that a continue the continue the continue the continue to the transmission of the continue that the continue the continue that the transmission of the continue that the continue that the continue that the continue that the continue the continue that the cont

trustee replied in effect that prior to this letter from the attorney no such request had been made, and called his attention to the fact that his letter made no offer of indemnity as required by the terms of the trust deed; it stated that his letter left the successor trustee in doubt as to whether it was requested to take possession or institute action to foreclose. The successor trustee requested the attorney to advise which, in order that it might be able to determine what indemnity would be asked. About March 14. 1934. the successor trustee requested the chairman of the bondholders protective committee to furnish it with a statement of account of all moneys that had come into the hands of the committee. The successor trustee received such statement and submitted it to attorney Cash under date of April 11, 1934, July 5, 1934, Cash presented to the bondholders protective committee bonds belonging to his client, and received her pro rata share of \$81.36. These payments were endorsed on the bonds.

No further communication was made to the trustee until July 25, 1935, when Cash wrete demanding that foreclosure proceedings be instituted. The successor trustee again requested an account statement from the chairman of the bondholders protective committee, obtained it, and on August 25, 1935, submitted it to Cash, advising him that it was informed that taxes - with certain exceptions which were to be contested - had been paid; that the bondholders committee strongly felt that operation of the premises by the owner was the best operation that could be obtained; that under the terms of the trust deed action could be taken only at the discretion of the income or there was a possibility of selling the property for a substantial amount, it could not see any advantage in a foreclosure proceeding, but nevertheless asked that

ing the institution, the microscope content in the city of the content of the con

the attorney examine the account statement enclosed, and thereafter consult with the trustee. August 29, 1935, the successor trustee received a letter from Cash advising that he regretted he had not received the letter of August 25th until August 27th, and that on August 26th he had filed a complaint on behalf of Tina ortgiesen in the Circuit court as cause No. 35-0-13638. His letter, however, stated that possibly the parties might get together at a later date.

Thereafter plaintiff applied for the appointment of the receiver of the premises and for the rents meld by the committee. The application for receiver was denied without prejudice. It is concaded by all the parties that the premises were insufficient security for the debt.

warch 24, 1936, Lena Sachs, also an original holder and owner of \$2000 of the bonds, by leave of court filed her intervening petition and was made a co-plaintiff.

the testimony of witnesses for plaintiffs and defendant having been taken and a written stipulation of fact read to the court and introduced in widence, in order was entered requiring and firecting the successor trustee to file a suit to foreclose the trust deed, upon giving indemnity to the successor trustee as required by the terms of the deed. Thereafter the successor trustee filed its bill by way of counter-claim to foreclose.

and on and prior to that date the petitions for attorneys' fees, on which the orders of June 23, 1936, and August 1, 1936, were entered, were filed. The record shows that there are 158 persons who hold bonds in the issue in olved in this proceeding, and that several of them are non-residents of this State. Persons holding about 85% of these bonds filed the same with the protective countitee, and

ten of similar and the last and the color of the second of

Anteritario, processor de como en la composición de la composición del composición de la composición del composición de la composición del

And transform of reitareasen for stable tips of references to the construction of the construction.

LTY is, 1850, the court topolated a growther for the tax and then property and the court for the court for a court for a court for a court for all formal for the court for a court formal fo

with the exception of Tina Ortgiesen and Lena Sachs none of them joined in these proceedings.

Disregarding contentions made by the appellants which are purely technical, the controlling question in the case is whether the services rendered by petitioners to the trust estate were of a kind and character such as to justify these respective orders. The bill filed by the plaintiffs was representative in form and character. Plaintiffs asked and obtained a list of names and addresses of bondholders, which were found to be 158 in number. However, only Tina Ortgeisen and Lena Sache joined in the litigation and became actual parties to the suit. The fair inference is that the greater number of bondholders did not approve of the bill filed by plaintiff's as being in their interest. Indeed, the bill itself alleged that through depositing their bonds and acting in conformity with the plans of the protective committee, the depositing bondholders had subordinated the lied of their tonds to that of the plaintiffs. The averments of the bill in that regard and prayer for relief of that kind was inconsistent with and a sinst the interest of other bondholders. The net result obtained by the filing of plaintiffs' bill was a decree directing the forelesure of the trust deed and later the appointment of a receiver for the premises. In resisting the petition for foreclosure, the trustee relied on a provision of the trust deed to the effect that the trustee should not be required to take any action to foreclose unless requested to do so by the holders of 25% in amount of the bonds then outstanding. The trial court apparently hold this oravision unavailable under the circumstances, but there is nothing to indicate that the trustee failed to act in good faith. The trustee could have reasonably relied on decisions of the courts of ing such a provision valid. Pearlman v. Lincoln-Belmont Building Corp., 251

്കെ വ്യാത്യമാന് വ്യാത്യ വിത്യ വിത ഉള്ള വിത്യ വിത

Mary arthur of the contract of

To be the plant of the all constance publications and plantage the constance the constance of The rest to the living of the environment of bearing about the field .gr Two divide the Dorse year jine di Tone wat a li li li li li li THE MODELLE STARTS ASSETS OF MAIN STARTAGE AND AND THE MILLIANCE AND is nough to wast a bandons of the said wastership is a subject to the contract of the subject of the subject of with each is a cost state of an application and plan thereto. granted with the ... . At our or relation because or man Am making n. The eyence: Jar Tit gyethic ta. The geomean godicet; but soul si Mil Filed by audutiffs so being is tells latereds, sacast, till it all plots through a northly coeir to be all to in craft smitty is the dans of the armeening of it. , i.e. of stem winds to mail on, whi distrains I a switch rand, withour transferred at 12 July had by Julian 1996, both and the land for land imale, but dale , . . Caleval and This tead to Teller to' Trypto ins to the design of sever temper see one. Let element were of the second in the To the state of the contract of the state of the trube and and I var the problement of a recolour con the presides, as reciebin, the prelides for fittings and, the tracted one felt testi som to block samt but in molling a in filler escapardi a abisea ga maa a hedinger en den Sieche moourt erib to sement of the presence that you are able to be asset to select were play a feel that one are desired letter and the tell accepts their attacks vicion which it sie enfor the extra extract, but when it havein to orizant en' distri borg di sec un logical entrepa de : d. d. the plant are witness over 10 min regard by Spilled Spinsteries. per principal property and agranting place with

Ill. App. 135; Couen v. Central Republic ir. co., 20. 10. App. 569; Chicare Little a rest do. v. hobin, bol Ili. 261. The Asence of findings in the decree of Lay 5, 1936, which directed the foreclosure is significant. It does not find that the trustee was derelict in its duties. It contains no finding that rents. issuce and profits had been improperly used by the bondholders protective consittee, or that the committee should account for any sum of money whatever, or that it was failing to protect the interests of all the bondholders, depositing and non-depositing, or that defendants had taken any action against the best interests of all the bondholders. There is no finding that petitioners through the proceeding carried on by them have preserved the trust estate, restored the trust estate to trust uses, or created any fund which will result in a common benefit to the parties whose profit has been ordered taken for the payment of these services. The most that can be said upon this record is that possibly the future may disclose that these services of petitioners have been of some value to the bondholders.

The allowance of compensation for attorney's services in this class of cases is unusual. Under circumstances far more compelling than any which here appear, such allowance was approved by this court in First hational Tank of Chicago v. Labelle-Vacker Blds. Corp., 200 Ill. App. 188. One of the Justices practically dissented, placing his formal concurrence upon the express ground that no objection was raised in the trial court to the allowances made. After a discussion of authorities in this and other jurisdictions, we there stated the rule to be as follows:

"We think the rule is firmly established that a court of equity or a court in the exercise of equitable jurisdiction will, in its discretion, order an allowance of solicitor's fees to a party who, at his own expense, has maintained a successful suit for the preservation, protection or increase of the common fund or

A CARLO A CARO

If asouth a sign of confidential to the character of confidential said as is a said as a

To state a little see the chiral sections of all terms and and terms of a chiral parts of a chiral par

In the <u>Wacker</u> case no party questioned or could question the value and utility of the services which had been rendered in behalf of all the beneficiaries. Here the utility and value of the services is denied by the successor trustee and representatives of a large majority of the beneficiaries. It is impossible to say whether the services of the petitioners will ultimately be a benefit or a detriment to the estate. We know of no case where under such circumstances such allowances have been permitted to stand. The objections of the successor trustee and of the bondholders must therefore be sustained.

Upon what theory the second order, making the allowance of fees a first lien against the receivership estate, was entered we do not see. As the owner of the equity points out, income from real estate in the possession of a receiver pending the prosecution of a proceeding to foreclose a trust deed may be applied only to the payment of the necessary and proper expenses incurred in the administration of the receivership estate; and it is the duty of the receiver to collect and hold the income until the foreclosure sale, when, in the event of a bid insufficient to satisfy the mortgage indebtedness, the rents may be applied on the deficiency. If the mortgaged property is bid off at the foreclosure sale for the full amount of the decree, interest and costs, the owner of the equity of redemption is entitled to all the income from the premises and the possession thereof until the period of redemption expires.

Davis v. Dals, 18 Ill. 239; Libert v. Loses, 340 Ill. Apr. 302;

of comment extractory, or the trace of the control of the control

which are to be we have a contract the state of the contract of

LI Jose et al e de la colon de la companya e colon de la colon de se colon de

The first of the control of the cont

Hindman v. Off, 246 Ill. App. 523; Corcoran v. Fitz, 253 Ill. App. 473; Shinnick v. Mincer, 259 Ill. App. 107.

On no theory of which we can conceive may it be held that the services of petitioners were in the interest of or for the benefit of the owners of the equity of redemption. We held that both orders were erroneous and improvidently entered, and for that reason both will be reversed.

REVERSED.

O'Connor and mcSurely, JJ., concur.

475; chiantel alebase, for the commence of the

The first section of the section of the control of

.

A smooth to the time theater

and serial to exercit

75.

JOHN A. RCL/SIRD, JERCHE P. BORES

BORNIC B. HACKETT, JOHN T. HOLT, JOHN J. BARROWN, JOHN T. HAVETS, RADIM A. DWAD & COMPANY, an Illinois Corporation, and W. B. PRASATRETEIS, Defoundance, APPEAL FROM GIRGHIT COURT -

289 I.A. 614

THE STATE STATES OF THE SCHOOL OF THE SCHOOL

Picintiffs are the censers of sertain bunds in the approgate principal amount of \$4000, being a part of an issue by the Wichigan Chastnut Muilding Corporation on November 87, 1927, for the aggregate principal amount of \$575,000. The bonds are by their terms payable to bearer, draw interest at the rate of 6-1/4 per annus payable send-annuclis, with interest at The per annue agent measurity. Sovember 15, 1937, this issue of bonds with upopone representing the interest which would sorrue thermon wave delivered to Greenshame Same Investment Company in recognition of the indebtedness of the building purporation to the investment suspany. On the case date the building supportion everyied and delivered to the Bank of America, as trustee, a trust deed conveying to said bank a lessehold estate made by one Savyer, as lessor, to the Michigan Chestmat Pailding Corporation, as leaves, is a part of this transaction in which these bonds and trust deed were delivered, and for a valuable consideration, the defendants under their hands and scale executed and delivered an instrument in eriting, is and by which they custuated the payment of these Sonds and opupons to each and every holder of the boads and soupens, and to the neiro, legal representatives, successors was

assigns of each and all of theu,

This suit at law is against these quaranters upon this guaranty. The complaint expressly declares on the guaranty and a copy of the writing by which defendants guaranteed payment is attached to the complaint and anies a part of it. It is alleged animalited that the Building corporation failed to pay the interest that become due and payable on the bands November 15, 1933, May and November 15, 1933, and May and Devember 16, 1934. Because of these defaults the successor trustee declared all the indebtedness that had not metured to be due and payable, as it was by the trust deed authorized to do.

Warch 31, 1934, the Control Republic Trust Josephny, sucoccoor trustee, filed in the Circuit court of Cook county its bill to foreclose the trust desd, the case being No. 34-C-4253 in that sourt. This suit at les by those plaintliffs upon the switten guarantee was filed in the same court on December 24, 1984. The somplaint was duly verified, setting forth the above facts as already stated, with a verbasin casy of the guaranty attached to the compleint and made a part of it. By paragraph is of the masses, as assended, derendent interposed the derense of another aution pending. This amonded paragraph was on motion of plaintiffs atricted. It will be unnecessary to describe other pleadings further than to may that if true the answer set up a substantial defense in that, under the facts averred, if true, the written guaranty had by its own terms terminated. Affidavias and evidence were submitted as this issue upon a motion made by plaintiffs for summary judgment. July 17, 1936, the death of plaintiff Coldman was suggested, and the administraters substituted. The motion for summer judgment, in conformity with section 57 of the Practice act and Rule 15 of the Supreme court, was heard. The motion was allowed and judgment was wavered to rever or the Coldess estate for \$1845,54; as favor

and the second of the second o

in the first of the second of the second

n de la companya del companya de la companya del companya de la co

of plaintiff, Reboom Cobacker for \$3493.08; and in favor of plaintiff, Miller, for 11848,54. Defendants Holabird, Bowes and Bendix prosecute this eguest.

in this record for the determination of the court. Shether plaintiffs are entitled to maintain their action in view of the action
pending in their behalf by the central Republic Trust Company, as
successed trustee, against defendants upon this same written guarant,
whether or not the affidavite and deposition filed in support of
plaintiffs within for action by defendants in opposition to
plaintiffs motion present a defence sufficient to entitle them to
defend upon the merits.

arising on the record may be reduced to two. First, whether the court erred in striking on motion of plaintiffs paragraph 18 of defendants' answer so amended, and second, whether the affidavita substituted by defendants disclosured to the guaranty was in fact terminated.

Irrespective of these two issues, the questions arising on the record to unlike your obtained to the questions arising on the record to unlike your obtained.

The practice act and Fall 18 of the Supreme Court,

is the first point is controlling, we shall give it consideration. The amended paragraph was filed May 13, 1835. The paragraph is as follows:

That this suit cannot be maintained because there is another of the course in that on or about Earch 31, 1834, Central Republic

the control of the co

entration to the control of the cont

A second of the s

à

Trust Sompany as successor trustee under the trust deed securing said bouts alleged to be exact and held by the plaintiffs herein, by virtue of the pasers granted to it by the said trust deed and the guarantee herein such upon, brought an action in the Oursuit counsed to be issued out of that ourst on or about said hereh 51, 1954, a summons requiring each of the defendants herein named as defendants to appear and defend against the complaint filed by the said Courtel Republic Trust Descany as successor trustee, which said complaint sought to enforce on benefit of all the cond-holders, including the plaintiffs hereis, the guarantee herein such upon, as will more fully appear from an exceination of the records and proceedings on tile in said cause in this court; then by virtue of the provisions of the said trust deed and the guarantee herein such upon the said Jentral Republic Trust Company, ancherol.

1. 1954; that said suit is still pending and undisposed of, and these defendants therefore jointly and severally prop that this cause of action be demanded or abated as to them."

In favor of the motion to strike, it is urged that the place another sotion perding is a dilatory plea and therefore not amendable. Bacon v. Johannin, 185 Ill. 187, and Spancer v. 1912.

Indeenity Co., 331 Ill. 23, are cited. These cases held that at common law a plea in abstement which is dilatory in its character might not be amended, but the plea of another action pending was not then and is not now one to which the rule is applicable, for the reason that it was and is regarded as a movitorious plea. Buckley v. Harlay, St Ill. 361. Section 45 of the Civil Practice act approach that the plea of another court, the plea was amendable at the discretion of the court.

It is contended in the next place that the averments of this paragraph of the answer are insufficient for the reason that the pleadings of the alleged former suit are not sufficiently set forth to enable the court to determine that the same issues are in fact involved in this as in the former suit. Defendants cite Torner, Letta, 177 Ill. App. 200. The opinion in that case states;

list, revertheless it fails to set forth with any degree of certain; what was absolutely sesential - its nature, character and objects,

and the produce relief propositive in the famor well were token set. 737), or that the proceedings in the famor well were token for the famor well were token for the famor will were token for the famor will be appearance.

The statement does not sustain plaintiffs' contention, nor is it sustained by any provision of the Civil Practice act called be our attention.

Ann. by McCaskill (see Appendix I, form 48, p. 58) nor in Edminds Illinois Fractice Forms (see Nos. 1147, 1148 and 1583) indicate that it is necessary to set up the pleadings of the former suit. It will, however, be noted that the pleadings in the former suit here are alleged by paragraph 18 to be on file in the sourt in which the instant action is pending and, of course, are subject to inspection.

It is next contended that the paragraph should have been stricten because plaintiffs have the right to pursue concurrently three remedies on ascount of a moregage indebtedness. That is, the plaintiff may our at les for the daby, may foreshose in soulty or bring ejectment for possession. So it is said a suit by the trustee to forsolose the sortgage sould not but a suit by a mondholder upon a guarenty of payment of the comis. Molkenstein v. Plants, 350 iii. 306; Lavelly r. Steiner, 770 Iii. Nop. 181; Albank v. Pradence Co., Inn., 572 %. V. Bupp, 508, ere sixed. This propusition is well assablished and unquestioned, but that is not the question reised by this persgraph of the queser. These cease do not buld that a plaintiff may bring two suits at ine of the come time in the east jurisdiction on the case comes of action, or that he may bring two suits in ejectment for possession under the sand sircumstances, or two fareclassive on the same mortunge.

and the second second control of the second second

where a is the set of a is a is a in a is a in a and a is a in a

It is next argued that the allegations of this paracrail. of the answer that the trustee brought the estion by wirthe of the powers growted to it by the trust deed and the guaranty is a pure conclusion of law as is the allegation that the trustee is acting on behalf of the plaintiff by virtue of the quaranty. It is a rel. esid that the trust deed nowners appears in the plan, and the pleadings in the forcelamns setion are newhere set up. The plaintiffs say that the defendance ask the court to accept defendants' own legal conclusions as to the legal effect of the guarant, and of the trust deed. To this point plaintiffs oite Cole v. Speer & Sans Co., 298 Ill. spp. 578, and Chicago Tielo and Pries Go, v. Ophen, 284 Ill. App. 181, 137, with many other cases. They urge that a suit in assumpsit for the debt and a suit to foreclasthe trust deed against the property may be brought concurrently, and that any provision of the trust doed purporting to give the exclusive right of action to the trustes would be held to apply only to the foreelosure proceedings. Gause v. Simon, 269 111. Apr. 196, is cited. They say the holder of the bond one discard the mortgage entirely and one on the band. Sturmis Bot, Bank v. Harris Prist & Savings Sank, 351 111. 465. Even language in a trust dee! purporting to bar a suit at las is held applicable only to proecodings involving the mortgaged property. Covinna v. Menalor A Handella Teans 358 Ill, 303; and defendante may that examination of paragraph 18 in the light of these authorities shows that the only allegation here is that she trastee brought a foreclosure ne-Tion in which it sued in bahalf of all the bondholders to recover on the gueranty.

graph shows authority in the trustee to being an action at law upon the guaranty, this rould not authorise bringing such an action with a formalosure proceeding, and they give Magar v. Hobus

pleadings of the fermer action a part of the plea could the court be shown what the neture of the proceedings really was, and plaintiffs cite other cases where sotions to abate a suit at law beomuse equitable proceedings were pending were dismilated for the
reason that the reaction were consurrent. The cases cited are
Exikans v. Early Dec 111. EEC, where a suit to enforce a mechanist
lien are involved. Secondy Miss. So, v. Goldberg, 68 lil. App. 568.
where a subscipent creditor's bill by enother debtor was partitle?
although a prior proceeding of the same thad was pending. Irish
to Simpact, 200 lill. Se, where a patitioner, praying that a will
in the Problem court eight to set taking and held not to be seen
cluded by the fact that patitioners prior thereta had filed a suit
in chancery to set aside the probate of the same will.

The fivener case is, as thing, inconsistent with the conof Laguard v. bre, 361 Ill. 188, which is of course controlling, The other occes are not applie-ble or controlling here, although the principles announced therein are not at all questioned, Plaintiffs loss sight of the real issue. It is not a mention of what the rights of a bounded or to twinting a suit on the sugranty are. That right is one sled. The real queries is, Dees a bendholder have a right to maintain two muits at law against the guaranter, one in which he personally prograntes the suit at law, and the other in which is prosecutes by his trustee to the same end and is the name court and against the case defendents? The plaintiffs have entirely overlashed section 46 of the Civil Priotice set. which permits the joinder of legal and equitable actions. Under that section it is permissible to join an action to forceless in equity with a suit at law on the guaranty. Under that section the law as stated in Balch v. Van Horn, 33 Ill. App. 170, on which plaintiffs rely, is no longer applicable. Plaintiffs are mistaken

when they say that the guerapty agreement was not before the court, A verbatim copy of it is attached to the complaint. It appears on pages 5 to 14 of the abstract. The guaranty expressly provides:

further !cintly and severally agree that they or either of them may be joined in any action agrics and Michigan-Chestant Building Corporation and that recovery may be had against them or either of them than either in such action or in any independent action without an independent action without Building Corporation.

in the event of the forselowers of the deed of trust hereimphove reterred to end of a deficiency, said parties of the first part hereby jointly and severally marrantee, promise and agree to torthwith pay the amount of such deficiency, but this coverent whell mut limit or oughtly the other resultes which may be purees under this marranty."

Pursuant 2 of Section 42 of the Civil Practice Act

providee:

٠

"No plending shall be desend had in substance which shall contain such information as shall reasonably inform the apposite party of the nature of the claim or defence which he is called upon to meet."

plicable to this plea of another action pending. The other suit pending was identified by mumber as well as by parties. It was pending in the same court in which plaintiffs sued and inspection of the plandings was tendered by the plea and the pleadings were easily available for that purpose. Seither in Schneider v. Saith. 271 Ill. App. 414, nor in Leguard v. Erz, 781 Ill. 185, did defendant incorporate the pleadings of the former suit in his plea, yet in both cases the pleadings of the former suit in his plea, yet in both cases the plead were held sufficient. In Leguard v. Bre, the plaintiff was held precluded on facts which while distinguishable are much like those which here appear.

The purpose of the rule which prevents the maintenance of two suits upon the seas cause of action is that a defendant may not be vexed by many actions. That reason is certainly present in this case. There is also the additional reason that equality may prevail the forms of the guaranty are equal. From the equitable standards.

the second state of the second second

g televistick at the entire televistic to the explorer product of the entire television of television of

by a spit at Ira in bahala of all thems bondhaid as any proand emovile for the rights of all the parties with a great force of certainty and expedition and sica fairness and goatles to all conserved. These reasons were held to be controlling to learned . Tro. The plaintiffs essent than the parties are not the man or use only one of the defendants has been served with process. to the suit by the successor trustee, before the mostion of the Divil Practice act a suit as conding for the purpose of a planof a prior suit pending when the susmone was issued and placed an the hands of the sheriff, Pollack v. Kincar, 176 Ill. avy. ..... By the terms of the Civil Practice oct, sec. 5, a civil nation to begun when cussions is issued. In the successor to the a serione summons was duly issued and delivered to the cheriff for a -vice and one of the defendents was actually served, Bervice ... as and was not, however, essential to the validity of the them. Taylor . Southern Ry. Go. 6 5. Supp. 259.

we hold that the court errod in striking the 18th paragraph of the enguer, and for that reason these judgments oil. he reversed and the cause remanded with directions to set aside the orier striking that paragraph.

ARPOTTORIE HIW CHEMMAN CHA CHOREVER

O'County and McSurely, dJ., conour.

and the second of the second o

TINA ORTGIESEN,

Plaintiff,

VS.

CHICAGO TITLE AND TRUST COMPANY, a corporation, as successor trustee, et al., Defendants.

On Appeal of CHICAGO TITLE AND TRUST COMPANY, a corporation, as successor trustee, E. G. SWANSON, R. J. PEORDRESHER and E. MERTENS, not individually but as a bondholders' protective Committee, WILLIAM A. LOMAX, not individually but as trustee under trust No. 396, RAYMOND J. DOWNEY, as trustee under and by virtue of a trust agreement dated may 10, 1935, ESTHER M. O'BRIEN, PAUL SCACCHI, MARY ESTHER M. O'BRIEN, PAUL SCACCHI, MARY REZZONICO, ROSE QUILLICI and JOHN REZZONICO.

Appellants.

TINA ORTGIESEN,

Plaintiff,

VS.

CHICAGO TITLE AND TRUST COLPANY, a corporation, as successor trustee, et al., Defendants.

On separate appeals of CHICAGO TITLE AND TRUST COMPANY, a corporation, as successor trustee, and RAYMOND J. DOWNEY, as trustee under and by virtue of a trust agreement dated May 10, 1935, ESTHER M. O'BRIEN, PAUL SCACCHI, MARY REZZONICO, ROSE QUILLICI and JOHN REZZONICO,

Appellants.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal, like No. 39193 with which it was consolidated for hearing in this court, is from an order allowing two petitioners, Francis E. Cash and Morris Blank, solicitors' fees to be taxed against the trust estate. The facts concerning both orders are fully set forth in the opinion this day filed in No. 39193. For the reasons stated in that opinion this order of August 1, 1936, like that of June 23, 1936, will be reversed.

REVERSED.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

Gen. No. 39193.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

Gen. No. 39204.

Pu Is no aux

, --

Constant to the constant that the constant the constant that the constant that the constant that the c

On Appeal of the 1120 like we wanted and off of the control of the

TILA CRICISCIA,

CPTCARRO 11111 & FREET OF OFFICERS, C COTTO

On secentar converte es URIDANO II due AMB LRUST COLORS, a come eral ou, se misses es arastes, est timo COD I. comult, la irrevent under colors timo est a trass personal under a comultato, acts purisant mat Josef Millioundo.

The same of the sa

# Particular to the second

. So where it is an entity thing we want to wis . A city is the control of the co

States 40% 1000

PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

VE.

245 EAST GRAND AVENUE SEARCH WARRANT.

OUTDOOR PUBLISHING CO., a Corporation, Intervening Petitioner, Ampellant. 16

APPEAR FROM EUNICIPAL COURT OF CHICAGO.

289 I.A. 612

AR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

May 27, 1936, James P. Hackett, by leave of court, filed a complaint against John Doe asking for a search warrant of the promises above described, 245 East Grand Avenue. The information was brought under paragraph 463 of chapter 38 of the Criminal Code. Smith-Hurd Illinois Revised Statutes 1935. Illinois State Bar Stats, 1935, page 1216 and paragraphs 715-721. The warrant was issued on the same day the premises were searched, and certain magazines were seized and brought into court. The matter was continued from time to time until August 4th, when there was a finding for the People and an order for the condemnation and destruction of the literature. Motions for a new trial and in arrest were overruled, and afterward an order entered staying the destruction of the property. The appel cant, the Outdoor Publishing Company, appeared and moved to vacate the order, claimed the property and prayed that it might be delivered to it. The motion was denied. and the publishing company appeals.

We do not care to place our judgment in this case on any merely technical ground. A copy of the publication seized is attached to the record. It is a magazine which purports to be devoted to extolling the artistic beauty of the undressed human body of both sexes, apparently photographed in the presence of each other. This is the theme of the brief of the intervening

SIALI 688

The string of a few of the content of the content of the string of the content of

A. S. Company of the state of the property of the state of th

petitioner, who cites <u>City of Chicago v. Jackson</u>, 137 Ill. app.

243, where this court affirmed a judgment of not guilty under
a municipal ordinance which forbade the exhibition of "indecent
or lewd" pictures. We there said of that picture: "It is not
indecent, although this may not be said of much of the exploiting
of it."

In that case there was an inspection of the picture by the court. We have inspected this publication. We find it is not artistic but ugly, not desent but lewd and indecent. The judgment of the trial court is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

de la completa del completa de la completa del completa de la completa del la completa de la completa del la completa de la completa del la completa

, thinker quite percursion per a limit.

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,

VS.

HARRY C. SHAVER, Plaintiff in Merror, ERROR TO MUNICIPAL COURT OF CHICAGO.

289 I.A. 612<sup>2</sup>

AR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant, Shaver, having waived a jury was tried by the court upon an information filed harea 17, 1935, which in three counts charged violation of Chapter 91. Section 24 of the Act concerning Medicine and Surgery. (Ill. State Bar Stats., 1935, p. 2055.) The information in substance charged that on March 17. 1935, the defendant, not possessing a license from the State to practice the treatment of human ailments in any manner, on the 17th of March, 1935, unlawfully diagnosticated or attempted to diagnosticate, operate upon, profess to heal, prescribe for, or otherwise treat an alment or supposed ailment of another, in that he then and there prescribed the taking of certain tablets internally, one after each meal, for an ailment or condition in conjunction with the pregnancy of Mary Bosch; that under like circumstances, at the same time, he unlawfully suggested, recommended, operated upon, professed to heal, or otherwise treat an ailment or supposed ailment of another, with the intention of receiving therefor, either directly or indirectly, a fee, in that he unlawfully prescribed for alleged pregnant condition of Mary Bosch the taking internally of certain tablets of unknown composition by her with the intention of receiving a fee therefor, a portion of the sum, \$15, being paid in cash on May 16th: that under like circumstances, on the same date, he unlawfully attached the titles "Dr.", "Physician", "Surgeon", "A.D." or other words or abbreviations to his name, indicating that he was engaged in the treatment of human ailments as a basiness, by un-



## and the state of the state of

to be a control of the control of th , the one was the first three to be within an empty to the first three (.8108 of the contract of the contrac and the country of the other country of the country y to a fix contains and and a contain the second containing as a containing entre de la companya or inclineda, a then, is a constantial, and are are all a constantial all the entropy of the distriction of the second system of the first of a report there are and the side of the highly the side of a distribution of the distribution of the side of the in a state of the section of the section of the section of

was the product of the contract of the contract of the contract of the contract of

lawfully signing his name as "Shaver, E. D." thereby attaching to his name the title of "E. D.", indicative that he was engaged in the treatment of human ailments as a business, all in violation of the provisions of section 24.

There was a trial by the court, the jury having been waived, a finding of guilty, and judgment sentencing the defendant to the Cook county jail for a period of one year and to pay a fine of \$500 and costs; that in default of payment after the empiration of his term of imprisonment he shall stand countited to the county jail until the fine and costs are paid or he should be discovered according to law.

The defendant sued out a writ of error in the Supreme court. That court, for the reason as stated in its opinion that no question was presented giving it jurisdiction, transferred the cause to this court. People v. Shaver, 364 Ill. 326.

It is contended in the first place that the court erred in denying leave to defendant to file a motion to quash the information. The information was filed February 3, 1936, charging the commission of the offense on March 17, 1935. On February 11, 1936, defendant appeared in court with his attorney, was arraigned and entered a plea of not guilty, and the cause was continued until March 3, 1936. On March 3rd defendant appeared with his attorney and the cause was set for hearing on March 10th, upon the promise of defendant's attorney that he would be ready for trial upon that date. On March 10th the defendant appeared with another attorney who filed a motion to withdraw the plea of not guilty, without, however, making any showing in support of the motion. The motion was denied by the court and the ruling is now argued as error. Under the circumstances, we hold the ruling was within the discretion of the court. People v.

Brickey, 346 Ill. 274.

It is next urged that the information does not state an

The second secon

. L. L. Strander of the str

Assignment of the control of the con

grand the control of the grand of the control of the

offense. first because it does not negative by proper averments that the treatment given the patient by defendant was administered in emergency, and second because the information failed to aver that a fee was paid to the derendant, and also because the information is insufficient to inform the defendant of the nature and cause of the accusation against him. People v. Brown. 336 Ill. 257, is relied upon. In that case an information filed charging a violation of section 2 of this statute (Ill. State Bar. Stats. 1935, chap. 91. p. 2050) in the language of the statute was held insufficient and violative of the constitutional rights of the defendant. The information in that case was not at all like the one which we are required to consider here. We think we are precluded from sustaining this contention by the transfer of the cause to this court by the Supreme court. Technical questions as to the sufficiency of the information are not preserved by the motion in arrest. People v. Pampilio, 359 Ill. 609. Section 24. under which this information was filed, done not by provise except evergency cases therefrom. That provision is contained in section 37 of the Act (Ill. State Bar Stats., chap. 91, p. 2056), which provides that the act shall not apply to dentists, pharmacists, optometrists or other persons lawfully carrying on their particular profession or business under any valid existing act of the State regulatory thereof, nor to persons rendering gratuitous services in cases of emergency, nor to persons treating human ailments by prayer or spiritual means as an exercise or enjoyment of religious freedom. we hold that all these exceptions were matters to be set up by way of de-

fense, and that it was unnecessary to negative the same in the information. People v. Fryst 1ski, 350 fl. 100; 'heals v. 11en, 360 fll. 36. The evidence then u on the trial discloses the gull of the defendant beyond all reasonable doubt, and without any mitigating circumstances. The judgment of the trial court is affirmed.

Jan Jan D.

and the second of the second o

CHICAGO TITLE AND TRUST COMPANY, a Corporation, as Successor Trustee, Plaintiff,

VS.

EGIDIO MAZZARESE et al., Defendants.

HARRY FRIEDEAN.

Appellant,

vs.

E. G. SWANSON et al., Appellees. 289 L.A. 012

COURT OF COOK COUNTY.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order approving the master's report of sale in a foreclosure proceeding; the report of sale stated that the property was purchased pursuant to a plan of reorganization, and a copy of this plan is attached to the report, and the order also approves the plan of reorganization.

Defendant's main point is that the court was without jurisdiction, in a foreclosure proceeding, to approve a sale and a plan of reorganization. The jurisdiction of a court of equity in foreclosure proceedings to supervise a plan of reorganization has been a subject of much controversy in the courts. However, our Supreme court in an opinion filed betruary 12, 1937, in First National Bank of Chicago, etc. v. Bryn Bawr Beach Blds. Corp. et al., discusses this controverted question at length and holds that a court of equity has jurisdiction to supervise a reorganization plan. This disposes of the major portion of the defendant's controversy in the instant case.

It should be noted that the master, in making the sale, followed the directions of the previous decree, from which no appeal was taken.

, on . i. . . i.

# (1 2)

e all 30 July Liver et al.

\* ប្រាស់ ប្រស់ ប្រាស់ ប្រស់ ប្រាស់ ប្រស់ ប្រាស់ ប្ទេស ប្រាស់ ប្រាស់

and the second of the contract of the second and the second text of th

juristick, i forreledent linke, to recent of a curic conond a circ of teer - fracture linke, in release of a curic of
oretic in freedomina eroon single to consider right of an or
onguistic on his or a subject of an electron-right to an
reariss, domest, and another obtain it so opinion titles acts any
it, leaff, i. this interpretation of antiques and another included the consideration of
the circ of the defend a contract of quity and farir taking an
antiques a rear sales that a contract is incores of another
one-miss a rear sales that a contract is incores of another
one-miss a rear sales that a contract is incores of another
oneone-miss a rear sales that a contract is the consideration of the defend of the defendance of the defendan

If areas the steady to the the the areas of the area of the same o

Defendant questions the sale in that the master accepted a bid partly in bonds and partly in cash. The trust deed provided that the bonds might be used and applied toward payment of the bid, and the decree was to the same effect. Even in the absence of such provision in the trust deed a decree is foreclosure properly permits a creditor to bid and to credit on his bid the amount found due him by the decree. Acceptance v. Causa, 87 111. Apr. 668, and Chillicothe Paper Co. v. Theeler, 63 111. App. 343, 348.

Some suggestion is made that the amount bid was inadequate and that this plus the sale to a socialed "durany purchaser" requires the disapproval of the sale. The principal amount of the outstanding bonds was \$122,000 and the sale price was \$32, ... It was not claimed in the objections filed by the defendant to the master's report that this sale price was inadequate; the buyer was a representative buyer pursuant to the plan of reorganization.

In Chicago Title and Trust Co. v. Robin, 361 Ill. 261, 273, the court said that judicial sales "should not be disturbed unless there has been some fraud, mistake or violation of daty by the officer making the sale or by the purchaser," none of which is shown here.

without giving any clear statement as to what the plan is or any basis for the criticisms directed against it. It is said that the bondholders were coerced to accept the terms offered by the bondholders were coerced to accept the terms offered by the bondholders' committee or be frozen out. The bondholders' committee was organized solely for the protection of the colders of bonds secured by the trust deed, and a total of allo, 400 was deposited out of \$122,000 outs' making. The non-depositing bundholders were notified of every step in the foreclosure proceeding and had the option to elect to receive in each their share of the bid price or to participate with the other bondholders as a stockholder. This

foliation of the control of the same of the end that is the time.

Here the service of t

were its a money jear involved on the table and again sing age had no and against age had no an action of the continuous and action of the continuous actions are actions and actions are actions as a second of the continuous actions are actions as a second of the continuous actions are actions as a second of the continuous actions are actions as a second of the continuous actions are actions and actions and actions are actions as a second of the continuous actions and actions actions actions actions actions are actions actions

the following like in the second of the second and the like in the last second of the second of the

entropy of the first term of the course of t

condition obtains senerally in all similar reorganization plant and has been approved in the approved court spinson in the instantance.

Bank case.

The instant plan provided that 20% of the stock should go to the owner of the equity, and this feature is criticized. But the plan also provides that the stock certificates issued to the owner shall be indersed in blank by him and deposited with the escrow agent under an escrow agree ent providing that in the event the owner fails to exercise ar covien to purchase the property situating three years the stock certificates shall be delivered to the corporation and canceled and the owner shall have no further rights as a stockholder. This 20% stock had no practical value to the owner except to give him a minority voice in the management of the corporation, and if he did not exercise the option to purchase all his rights as a stockholder ceased.

Some suggestion is made that the fees are excessive. Nost of these were awarded in the original foreclosure decree, which was not questioned, and we find nothing to support the claim of excessive fees.

No facts are presented which would justify this courtin reversing the order approving the master's report of sale and the plan of reorganization. The decree is therefore affirmed.

AFFIRED.

Matchett, P. J., and O'Connor, J., concur.

A the latter of the control of t

D. Lower and D. Company of the Co

Leggenerate in die volgener volgen volgen von in erweitere en eine in de de de einste de de de volgener volgener ein versche in de de de versche volgener ein versche versche volgenerate de de versche versche versche versche de versche versche versche de versche versche versche versche de versche versc

ejation tina juiper' komen ei in hid bunde nde amento di an wil na gini nomen em migh en hid vivenni di internita a semi in allega . Han tin es in hid di ego in hid viviliant i semi in dessa co

and otto for the teat that the company of the

39178

KELLAM FOSTER, Angellant,

VE.

JOHN H. POWRIE, doing business under the trade name of WARRER RESEARCH LABORATORY, Appellee. 19

APPRAL FROM MUNICIPAL COURT OF CHICAGO.

289 I.A. 613

ER. JUSTICE MCSURELY DELIVERED THE OPIGION OF THE COURT.

Plaintiff appeals from an adverse judgment entered by the court, without a jury, in an action to recover \$1000, claiming the rescission of a contract alleged to have been breached by defendant.

Defendant, Fowrie, was the owner of a process of color photography invented by him and Florence Warner, who was deceased at the time of the contract with plaintiff; certain patents has been issued and applications for other patents were pending.

bovember 15, 1926, defendent made an agreement with plaintiff which recited that plaintiff had paid defendant shoop "for purpose of assisting " \* in developing, demonstration, and marketing said process and inventions"; defendant conveyed to plaintiff "a 1/10th of 1% interest or share in any and all income, moneys or other things of value that may be derived from the sale, or license, or use of said warmer-Powrie Process"; that the defendant "will proceed with due diligence to prosecute his efforts to dispose of said inventions and processes to the best advantage to interested parties by preparing plates and films for color photography, and demonstrating their use therefor."

April 26, 1932, defendant entered into a voluntary assignment of his assets for the benefit of his creditors under the laws of the State of New York, and plaintiff says this was an anticipatory breach of the contract.

77

31: A.T. 90%

g de la constant

. 17

The second of th

A control of the first section of the first sect

Fig. 1. (All 1) And the control of t

Los de la companya de

Publication to Mark the interest of the factor of the fact

ware real terms and three reproperting and accompanies

September 22, 1933, plaintiff filed his statement of claim alleging his purchase of an interest in the income from the process, and that defendant, in violation of his agreement to proceed with due diligence to dispose of the process to the best advantage, made a voluntary assignment of his assets in which he conveyed to assigness all patents, inventions and applications covering the process, and all machinery and equipment for developing it, and that defendant by his own acts prevented himself from parforming the agreement, to the damage of the plaintiff.

November 24, 1933, plaintiff filed an amended statement of claim setting out at some length and in detail the substance of the original statement of claim and also the requisites of a volumtary assignment under the laws of New York, and that by virtue of such assignment all title and interest to the patents and laboratory and equipment became vested in the assignees; that they were later ordered to be sold at public auction and were afterward transferred by the assignees and defendant to one Caddy of hew York as trustee under a composition agreement whereby fieldy took title to all the patents and equipment, for the benefit of oreditors, and upon failure of defendant to pay certain notes at maturity the trustee was supowered to self illussets and livide our proceeds boong the creditors in proportion to the uponts due him; that defindant has not paid the notes and the trustee is authorized to sell the assets; that by reason of the assignment and composition agreement plaintiff is deprived of any possibility of receiving any income from the sale, license or use of the process; that the laboratory has been closed by defendant or his assignees and the machinery and equipment placed in storage; that the assignment and composition agreement were executed by defenden: to defrout the plaintiff; that in delendant's list of creditors in the assignment proceeding were listed certain false and fictitious claims; that plantiff's

white his the ready for the earth of a the look for the corner of Arministra public - There is no more than the arrest of the control o Many and the opening the many the company that the company then the first the control of the stable of the transfer of the specific of the content to be defended as a state of the content of the specific of the content of the con to all the grants on malarate, the relative of the of and the state of t <u>ของ โดยี และ เพราะสาย และ และ และ คระจาย เพลานนาทอาเครอร์ ตินาม โดยก่อยสำ</u> the mark bull the modern or burn there is a religious file of The state of the control of the decision of the control of the con and the second of the second o grand to the transfer and make the property of the role than description. one conformed and the element; the first the first through : The street of the control of the c this is among the list of are it are in a set of a continue 

suit was upon the contract.

Defendant's amended affidavit of merits admits plaintiff's interest as stated and avers that continuously he is prosecuting his test afforts to dispose of the inventions to interseed parties: admits the general assignment made by him but asserts that it was not in violation of their agreement, and denies that the assets and patents were ever offered for sale by the assignees; alleges that the transfer to Caddy was ineffective and the composition never became operative: denies in general the allegations of plaintiff that defendant has disabled himself from performing his agreement with plaintiff or that the assignment or composition agreement were executed for the purpose of defrauding plaintiff. An a and out was later filed in which defendant asserted that he had sold to various investors, including plaintiff, an aggregate of 65% interest in his patents; alleged that the composition was null and void because of the failure to comply with various requirements of the New York law which are set forth in detail; that a petition has been filed in the assignment proceedings demanding that we composition wrequest and transfer to Caddy be adjudged null and void, and that if this is granted arrangements have been made with defendant's creditors authorizing the assignees to reassign to defendant the process and inventions.

February 5, 1935, plaintiff filed an amendment to his statement in which he alleged that he had elected to rescind the written agreement and to recover back the \$1000 paid.

Defendant answered, claiming that plaintiff had not rescinded and alleging that he still held a valuable equitable interest in all patents which were held by defendant as trustee for plaintiff and other investors.

The contract between the parties contains no express or implied warranty of success nor any guarantee of returns by Powrie. ntiking a managa kanganan pangan kangan pangan ing kanganian kangan

process of the control of the control of the control of explain and add and on the control of explain and add add on the control of the control of explaints and add add on the control of the control of

At whomen a control we have a section of the four one of the force.

e a many by tober, structure and entered and as a community by the second and the

Specification for the highest work and that a product of the formal control of the second control of the secon

if control of the last and the state of the

with a solution of the solutions of the solution of the soluti

The process was still in an experimental stage. Defendant needed money to proceed with his work; to raise funds for this purpose he assigned to various persons interests in the expected profits; defendant promised only to use diligence in efforts to dispose of the process to interested parties. We do not find any claim by plaintiff that defendant has failed in this respect, or that the funds supplied by investors were wrongfally used. The record shows that defendant attempted to interest various parties, giving demonstrations in Chicago and in Mastings, h. Y., also taking up the process with the Eastman hodek Co. and the Deponts.

Plaintiff argues earnestly, however, that the voluntary assignment and the composition agreement with the creditors amounted to an anticipatory breach, citing cases like Chemical Nat. bank v. Forld's columbian experition, 170 III. 12, on the central Trust Co. v. Chicago Auditoriam assin., Bank J. 8.1. here also involve contracts not like that is the instant case. This contract was in the nature of a conveyance of a speculative interest; the process was not perfected; further patents were necessary; plaintiff made an investment which from the very nature of the case might not result in profits; he took a chance of losing if circumstances prevented gain.

constances to make a voluntary assignment for the benefit of creditors and that the proceedings were for the purpose of protecting the interests of the defendant and the investors in the process. There was a claim against the defendant of 311,000 for unpaid rent on the quarters occupied by him as a laboratory in New York; the landlord was threatening judgment and execution; defendant had no funds to meet these claims and in good faith sought the advice of an attorney, and the assignment proceedings and composition were carried out under this advice.

en appropriate the control of the co

The contract of the contract o

 $\omega$  , with ref. . The second this edges in the second property  $\epsilon$ 

Let it with the control of the contr

Plaintiff's counsel seeks to make much of the alleged false or fictitious debts or claims scheduled by defendant. Defendant oad been associated with Florence farmer as co-inventor of the process; certain persons had advanced funds to be used in furthering the photographic inventions; ander the advice of his attorney defendant listed these claims as being possible claims against the patents and equipment; it was only out of abundance of caution that they were listed in the schedule of creditors of the defendant. Defendant denied that he personally owed these persons listed as creditors. We are of the opinion that there was no anticipatory breach of the contract.

The trial court held that plaintiff by his acts had affirmed the contract and was not entitled to recover upon his statement of claim alleging a rescission. The record shows that plaintiff filed his original action as a suit for damages on the contract. There is no evidence that plaintiff ever offered to release his interest in any income to be derived from the process. It is well established that one seeking to rescind a contract must offer to put the other party in status que. sustad v. cerny, 321 111. 554, 359. And in an action at law plaintiff must place defendant in status quo before instituting suit. Floreneim v. catzert Co., 278 Ill. App. 54, 59. Rescission of a contract requires affirmative action immediately on the discovery of any fraud. Aichardson v. Lowe, 149 Fed. 625, 530. In anderson v. Unicago trust and Savings Bank, 195 Ill. 341, 347, a purchaser of stock first filed a bill for an accounting and an injunction to restrain the describant from disposing of his stock; two years thereafter plaintiff sought to amend his bill by claiming a rescission of the contract of purchase; it was held plaintiff could not rescind after naving previously filed his bill for an accounting; that his first step constituted

-will be borners out on Missister was like out to heigh and of claim the control of the control I'ver is no crite on a use of an test seem of item to, regers him interval in the the later to be an excise that the companies in the carr e g tha a green and a man a section of the sale of the put the stiff party in thing has and require bestand that. ef december to a confirmation of the ablocate at the . We evicus, in devisors so wanted to adjusted . ?? action & white is on and the sound for any store . significant ret - fill itt. itt gran te tostanes a fill itt fill fill fill ាក្យា្រូវស្រាយម្នាក់ថា នេះ នារីសារសេខ ១០ នេះជានេះសម្រែលី សេ កែវស្បែររំបែក ១០០ នេះ ១០។ the till by chaining a resultation of the contract of process; whatliver, halv a sale, beloom wee bis a This work, him and the all same give terming that and a mission are not like eight to an election, after a full knowledge of the alleged fraud, to affirm the contract of sale.

The record shows that in April, 1932, plaintiff noted as chairman of a committee of Chicago investors in the process, calling meetings of the committee; he also received letters and notices advising him of the situation in New York and of the assi, muent and composition agreements. He also signed a document addressed to the bidders and purchasers at the proposed sale of assets of the defendant in New York, reciting the interests of the various investors and that such interests were not subject to the dests of the defendant. Plaintiff during this time was active in attempting to protect his interests as an investor. Plaintiff's original statement of September, 1933, and his amended statement of November, 1933, both sounding in damages on the contract, and his actions, evidenced an election to stand upon the contract, and this bars any right to rescind as claimed in his statement of February, 1935.

Apparently no sale of defendant's assets has been held, and if the composition and assignment to Caddy has not been set aside, we see no reason why plaintiff might not assert his rights, if any, against Caddy.

We find no error with reference to the admission of evidence. Counsel for plaintiff argues that the court improperly refused to make certain findings of fact requested by plaintiff, but under section 64 of the Civil Practice act of 1933 (Ill. State Bar Stats.) the trial court was not obliged to make findings of fact.

Counsel for plaintiff has cited a large number of cases, which do not touch the essence of the instant case. Most of them are concerned with promises of one of the contracting parties to pay money for certain undertakings of the other. Here there is no

e and in series on ouit

.

and the state of t

\*\*\* The reference of the reference of

Agent I, and of the control of the c

pans. The second of the control of t

such promise. Plaintiff with others staked the defendant in perfecting the photographic process and took a hazard of gain or loss. Having elected in the first instance to stand upon his contract plaintiff cannot, over a year thereafter, elect to rescind.

The judgment of the trial court is right and is affirmed.

AFFI REED.

Matchett, P. J., and O'Connor, J., concur.

1

to produced.

the state of the s

.

and the second of the second o

38967

THE PROPLE OF THE STATE OF ILLINOIS.

Defendant in Error,

VS.

WILLIAM JACOBSON,
Plaintiff in Error,

ERROR TO MUNICIPAL COURT

200 I.A. E. 1.32

ER. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error tae defendent, Jacobson, seeks to reverse a judgment of the Municipal court of Chicago by which he was found guilty of obtaining money by means of felse pretenses and with intent to cheat and defraud. He was sentenced to be confined in the House of Correction for one year and fined \$2000. The information charged that "Mr. W. M. Jacobson" did unlawfully and fraudulently with intent to cheat and defraud by means of false pretenses, represent to Bertha herritt that he would then and there deliver to her a certain quantity of furniture which she was willing to purchase, and that he induced her to then and there deliver to him \$140 and that he delivered to her other furniture. Defendant pleaded not guilty, a jury was vaived, the court heard the evil ence, found the defendant guilty and sentenced him as above stated.

Defendant contends, as stated by his counsel, that "The information was insufficient and void. It charges the defendant with no crime or offense. \* \* \* Where an information charges no crime, the proceedings thereon are null and void"; and that the question of the sufficiency of the information is saved by defendant's motion in arrest of judgment. A further point is made that the information charged "Mr. W. M. Jacobson" with the offense, while the court found "William Jacobson" guilty and imposed the sentence.

A number of authorities are cited in support of the contentions made. We will not stop to discuss the authorities cited na mana matana m

e good of of this area

water the second of the second of the second of the second

The second secon

I we will not be the control of the description of the description.

in the contract of the contrac

Address of the company of the compan

wastara nin hasini ne sakabuak sen politika di niko ti sim e

tions of the list new days to though a west all the contract

because substantially all of the points urged have been determined adversely to the defendant in People v. Sullivan, 363 Ill. 34. In that case an original petition for mandamus was filed in the Supreme court for a writ commanding Judge Sullivan of the Superior court and ex-officio of the Criminal court to expunge from the records of the Criminal court an order releasing and discharging the defendant on a writ of habeas cornus. The Judge filed a decurrer to the petition but the court held the petition was sufficient and awarded the writ. The court there said (b. 35): "W. A. Jacobson ( Aso referred to as William Jacobson) was convicted in the number pal court of Chicago on a charge of obtaining money by false pretenses." The court then analyzed the allegations of the information and neld that it charged the defendant with the commission of the crime condemned by section 96, paragraph 288, chapter 30, Ill. State Bar State., 1935, and said (p. 38): "The information was not void, and it is unnecessary to consider whether it was defective. If defective a notion to quash could have been made, but no such motion was made. "

It having been adjudicated that the information charged the defendant with the commission of a crime, his convention that the information is void obviously is without merit.

Since the information charged defendant with the commission of a crime, if it was defective in form he should have taken advantage of this by motion to quash. Such defects cannot be reached by motion in arrest. People v. Wooley, 275 Ill. App. 378; People v. Glassberg, 326 Ill. 379; People v. Pamilio, 355 Ill. 609.

In the Wooley case we said (\*. 381): "The information may have been defective in form, but advantage of this should have been taken before the trial. Such defects cannot be reached by a motion in arrest. Par. 745, ch. 38 (Cahill). People v. dassil, 341 Ill. 236; People v. Glassbarg, 326 Ill. 379."

A REAL CONTROL OF THE REAL PROPERTY OF THE REAL PRO

Line is a particular of the control of the control

tion of the second of the seco

AT CARROLL OF THE ALL OF THE ARCHITECTURE AND A STREET OF THE ARCHITECTURE AND ARCHITECTURE ARCH

AND THE STATE OF THE TOTAL STATE OF THE STAT

In the Pamilio case it was contended that the indictment was insufficient because it set forth conclusions of the pleader as to a prior judgment of conviction. In disposing of this question the court said (pp.610-611): "It appears, however, that Pamilio failed to attack the sufficiency of that count prior to trial by a motion to quash. This failure precludes him from raising that question by a motion to arrest of judgment. A contrary expression has been cited to us in the case of People v. Goldberg, 287 Ill. 235, vacrein it was held that a motion in arrest of ju guent opened the entire record for examination, reacting any defect apparent therein; but in the wore recent case of Papple v. Classberg, 325 Ill. 379, we held that under section 9 of division 11 of the Criminal Lode (Smith's Stat. 1933, chap. 38, p. 1101) all exceptions soing merely to the form of the indictment should be taken before trial, and that no motion in arrest of julgment or writ of error, will be sustained unless it affects the real merits of the offense charged."

Mr. W. A. Jacobson with the crime of obtaining money under false pretenses does not grant power be the sunicipal court of chicago to find and sentence William Jacobson guilty of the crime of obtaining money under false pretenses," and in support of this the case of Turner v. State of Illinois, 40 lll. app. 17, is cited. In that case the defendants filed a plea of "mishomer in abatement" on the ground that the information charged J. p. Turner, Jr., and C. W. Turner with the offense and their plea of abatement aversed that they were baptized in the names of Charles W. Turner and James B. Turner. The court, on action of the State's automey, struck the plea from the files. This was held error and the judgment was reversed and the cause remarded. In 12 Cyc. 359, it is said, "A misnomer of the defendant in an indictment or information may and

um a la partir de la companya de la Recompanya de la companya de la comp La companya de la companya della companya de la companya de la companya della compa

and the second of the second o

must be pleaded in abatement, and the accused cannot, after plea of not guilty has been entered and the trial begun, be heard to object to a misnomer in the indictment. In support of this Davis v. Feeple, 192 III. 176, is cited.

In the instant case no plea in abatement was filed. On the contrary, defendant entered a plea of not cuilty. He is therefore not in a position to raise the point in this court.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

and the second of the second o

and the second of the following the second of the second o

.

38969

UNIVERSAL CREDIT COMPANY, a corporation,

Appellant,

V .

STANDARD OIL COMPANY, a corporation,

Appellee.

21

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

289 I.A. 613

MR. PRESIDING JUSTICE DENIS E. SUILIVAN DELIVERED THE OPINION OF THE COURT.

This case grows out of a transaction in which a Ford truck was sold by the Ford Notor Company to Litzner Bros. upon an order of said Litzner Bros. and thereafter sold by the latter to the Standard Oil Company of Indiana located at Orean Bay, Disconsin.

The plaintiff, a finance company, aided Litzner Bros. in paying for the truck to the extent of 1007.60. This suit is for the purpose of recovering that sum from the Standard Cil Co. as they have not paid for the truck, but are willing to do so whenever the court shall decide to whom it should be paid.

After suit was commenced by the Universal Credit Company, as a fourth class claim against the said standard Oil Company, one J. E. Quinn who claims to have been an assignee of the sale price of the ford was permitted to intervene. Judgment was entered in favor of the intervener winn and a first the Standard Oil Company for the sum of \$811.49.

The consideration for the assignment to Quinn by Litzner Bros. was for 300 in cash and an additional amount which Litzner Bros. owed to quinn on account o goods theretofore bought by them from Quinn.

This case is one which is almost entirely controlled by the facts as shown by the evidence. Nost of the evidence in the case was stipulated between counsel and appears in the abstract,

When Quinn received the assignment of the account from

Fig. 1. The contract of the co

be a second of the second of t

This has a rest of how to most on the same same of the same with the control of t

The state of the s

with one little the restrict and gold some and one of the restrict two grants and the restrict of the solution of the restrict of the restrict

ತಿಗಳುಗಳಿತು ತನ್ನ ಗಣಕ್ಕೆಗಳ ನಿರ್ವಹಿಸಿದ ಪ್ರಾಥಿಸಿ ಕಾರ್ಯ ಗಾಲಿಸಿ ಅಧ್ಯಕ್ಷ ಕ್ರಾಂಡಿಸಿದ ನಿರ್ವಹಿಸಿದ ಪ್ರತಿ ಕ್ರಾಂಡಿಸಿದ ಪ್ರಾಥಿಸಿ ಕ್ರಾಂಡಿಸಿದ ಪ್ರತಿ ಕ್ರಿಡಿಸಿದ ಪ್ರಿಡಿಸಿದ ಪ್ರತಿ ಕ್ರಿಡಿಸಿದ ಪ್ರತಿ ಕ್ರ

ent of the contract that is a first for the entire who have a contract and the entire of the entire

Litzner gros. on June 31, 1975, he forwarded the same to the Standard Oil Company and they acknowledged receipt of it.

It further appears from the evidence that when the Ford Motor Company sold the truck to Litzner on any 47, 1935, it was sold under a conditional sales contract. Plaintiff herein, as heretofore stated, was the finance company and furnished .607.60 for the curpose of payment on this truck. The conditional sales contract was assigned to plaintiff.

On June 27, 1935, approximately one month of the execution of the conditional sales contract the truck and delivered to Litzner Bros. at Sault Ste. Merie, Michigan. On June 34, 1935, without the knowledge or authority of the plaintiff, who then had title to the truck, or without paying the plaintiff the amount due under the conditional sales contract, Litzner Bros. delivered the truck to the Standard Oil Co. at Escanaba, Michigan.

Prior to the time that Litzner Bros. received the truck from the Ford Motor Co., about June 31, 1935, Litzner Bros. asked J. E. quinn, who was the local agent of the Standard Cil Co. at St. Ignace, Michigan to lend them 300.00. At the time Litzner Bros. were indebted to J. E. quinn for 513.33 and they offered to assign the moneys due for the truck from the Standard Cil Co. as security for the loan and also for the past indebtedness. To secure this loan Litzner Bros. executed an assignment of the money due for the truck to Quinn.

Intervener's Exhibit 12 which is a letter from the Universal Credit Company, dated July 15, 1935, to the Standard Gil Co. is quite illuminative and reads as follows:

"Furthering our conversation regarding an open account basis by your Company in Green Bay, it has come to our attention that there is a prior claim to a party by the name of 'Quinn' in the amount of 300.00 against the 1811.78 remittance due on this open account, in question.

Professional and the control of the

Ab Joseph C. C. Company Commission of Commis

mojd who were it is into such and its thing on the form of the strike or such that construct and the construction of the const

independent of the control of the co

Secretar red compression of the later. The fallow of the constant for a later of the constant of the constant

ថ្ងៃស្ត្រាត់ ទៅ។ នេះ ប្រសិស្ត្រាស់ ស្ត្រាស់ ប្រសិទ្ធិស្ត្រាស់ ប្រធិប្បាយថា ប្រធិប្បាយថា ប្រធិប្បាយថា ប្រធិប្បាយ សូមត្ថិសុស្ត្រី ប្រែការប្រធិប្បាយថា ប្រធិប្បាយថា ប្រធិប្បាយថា សូមតែការប្រធិប្បាយថា ប្រធិប្បាយថា ប្រធិប្បាយថា ប្រ ស្ត្រាស់ ស្ត្រាស់ ស្ត្រី ស្ត្រី ស្ត្រី ស្ត្រីស្ត្រី ស្ត្រីស្ត្រីស្ត្រី ស្ត្រីស្ត្រីស្ត្រី ស្ត្រីស្ត្រី ស្ត្រីស្ត្រី ស្ត្រីស្ត្រីស្ត្រី ស្ត្រីស្ត្រីស្ត្រី ស្ត្រីស្ត្រីស្ត្រី ស្ត្រីស្ត្រីស្ត្រីស្ត្រី ស្ត្រីស្ត្រីស្ត្រី ស្ត្រីស្ត្រី ស្ត្រីស្ត្រី ស្ត្រីស្ត្រីស្ត្រីស្ត្រី ស្ត្រីស្ត្រីស្ត្រី ស្ត្រីស្ត្រីស្ត្រី ស្ត្រីស្ត្រីស្ត្រី ស្ត្រីស្ត្រី ស្ត្រីស្ត្រីស្ត្រី ស្ត្រីស្ត្រីស្ត្រី ស្ត្រីស្ត្រី ស្ត្រីស្ត្

We wish to go on record as acknowledging this as a prior claim, and it will be satisfactory if you will arrange to remit the remainder, or v511.78 when paid, to the order of our Company alone, or our Company and the Dealership.

We hope this handling meets with your approval and will appreciate acknowledgment of the menner in which it will be handled by you."

This letter shows that Suring the transaction all the quinn claimed was \$300.00 and we think it clearly appears that that is the extent of the amount which he should receive at this time. The Universal Credit Conceny claims the entire sun, but this letter, which is in the nature of an admission procludes either of the free receiving more than is therein provided.

JUDGMENT REVERSED AND JUDGMENT HERE.

HEBEL AND MALL. JJ. CONCUR.

A to decide the control of the co

Let be a common of the common

Increase of the control of the contr

HUGENIA S. DOGGETT,

Appellee,

V.

MARGARET L. BLOCHER, et al., Defendants below,

MATHEA HANSEN, Intervenor,

Appellant.

James Jameson

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

269 I.A. 6137

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

On March 31, 1934, Hugenia S. Doggett filed a bill to foreclose a lien, being a mortgage given to secure a note dated August 9, 1934, made by defendant, Margaret L. Blocher, in the sum of 0,000.00.

The summons was issued May 14, 1934, and an affidavit of non-residence was executed by Thurston ... Lundeberg and filed on August 14, 1934, stating "that he is one of the attorneys for plaintiff and that Mathee Hansen and unknown owners, defendants, on due inquiry cannot be found, so that process cannot be served upon them, and that upon diligent inquiry their places of residence, either present or last known, cannot be ascertained."

On October 4, 1934, an order of default was entered. Mathea Hansen, who was in default, was served by publication for failure to answer or appear and it was ordered that the complaint be taken as confessed against her.

On January 29, 1935, a decree was entered finding a total indebtedness due plaintiff of 6,187.48, and ordered that said real estate be sold to satisfy the said decree.

The appearance of I. W. Kaufman on behalf of Mathea Hensen was filed on January 28, 1936.

The petition of Helpe Anderson was also filed on January 18, 1936, as the authorized agent of Lather Mansen, the owner of the real estate. The petition further states that after the commencement

enter de la companya de la companya

Although continues to record of the continues of the control of the con

ter , chemister of 120 cm of the control of the con

The decided CD Tesp AdDisport to composition with a late of the American content of the American content of the American content of the CD AdD and the content of the conte

Control of the control and control and the control of the control

did the said Mathes Hansen have any knowledge of nor was she served with any notice by plaintiff and that the first notice she had that these proceedings were pending was in the Fall of 1935, when she was advised that foreclosure proceedings had been instituted a sinst this property: that Mathea Hansen acquired title to the real estate on August 25, 1933 and took possession thereof in June, 1934, since which time she has been living there; that on and prior to August 14, 1974. she was living in said premises; that plaintiff and her attorneys knew she was living in said premises or could readily have ascertained the same; that the affid wit of non-residence is I last and that the plaintiff and her attorney knew the affidavit of non-residence was untrue: that Mathea Mansen has been deprived of the right to appear and defend herself in these proceedings and has been deprived of the right to exercise any and all rights that she may have and that may be hers by virtue of the Laws of the State of Illinois and of the United States of America; that petitioner prays for the entry of an order, as follows: (1) striking said affidavit of non-residence; (2) vacating order of non-residence; (3) vacating decree of sale; (4) vacating decree approving master's report of sale and distribution; and, (5) allowing petitioner to appear and defend and for such other

of the suit no su mons was ever issued against Wather Mansen or

served on her and at no time during the pendency of these proceedings

On January 28, 1936, an order was entered granting Mather Hansen leave to file petition instanter; giving interested parties leave to file answers or pleadings; setting hearing on contested motion calendar on February 17, 1936; granting Melen Abbey leave to file an intervening petition.

orders as the court may deem meet.

On February 6, 1936, Nehen Abbey filed an intervening petition, in which it is alleged that on February 25, 1936 a certificate

the state of the fact that the state of the a part of the control mitte stay addied by it intille me made in the item is mure, as not easily and C. Marway, A. L. G. Lin, And the Community HC (1997) of price sense, benefit interview of the process of the proc tiel, for a selection introduction; officially, on a bed one tails Barnindrawana - to a sali hawa salaba na barak tan Idari . Pakatala hito basa maka and a contract of the abstraction of the contract of the contraction o ted to ferfore) condition in the construction of all lengths but the ton, seeda ist beest ye. In look this dr. III the tite relieves of sitells tida for an ordenista for as an error terror to be even in a constitut of the error n in the property of the analysis of the control of the state of the s orme, to sollows: (1) toriving the file file into-real search into it lembe the born (B) (secolition of the metro gainstive (S) <mark>(ach util-joii be - is to to the steel of a traiter and instance of interv</mark> and, (a) allowing this car so he made that the such defice with the artists and a section of the free free

odd o dideng - han dan e - hange or job i job ymumat oo ening : loden ands stain yallanani edilina bili ah anda kan ening : loden and dain di jointan (lodina), an en anda bili ah anda ening an alge e edini joint o joint y i ylaman loo o comin aniban elic on interpressio - chilan.

on learning d, 1980, delen thing tille to intervented.

position, in thich is elected this on learning Td, 1985 - explication

of sale was issued to queenie C. Secord on the premises herein involved, pursuant to a sale of said premises.

The intervening petition of Helen abbey further allages that petitioner purchased said certificate of sale in movember, 1935, and is the assignee and owner thereof; that said certificate of sale is based upon the valid decree entered against defendants, including Mathea Hansen, served by publication.

It further appears that a motion was made to dismiss petition of Helga Anderson for the reason that said petition does not set forth the facts; that an order was entered on February 38, 1938, giving Helen Abbey leave to withdraw motion to dismiss and giving Mathea Hansen leave to file an amended petition; that said order also gave Helen Abbey leave to answer or reply to the amended petition and setting the hearing for March 13, 1936.

The amended petition of Helge Anderson claimed that she had been deprived of her right to seek relief in the United States District Court, under the laws of the United States of America and specifically under Section 74 of the National Bankruptcy Act.

It further appears that on April 11, 1936, a motion was filed to dismiss the amended petition of Helm anderson and on the same day an order was entered by the court giving leve to Helen been to withdraw answer to the amended petition of Mathea Mansen and to file instanter her motion to strike and dismissing the said petition and denying the relief prayed.

This proceeding is governed by Chapter 110, Paregraph 178, Section 50 of the Ill. State Bar State. 1935, which reads as follows:

<sup>(8)</sup> When any final decree in chancery shall be entered against any defendant who shall have been served by publication with notice of the commencement of the suit and who shall not have been served with a copy of the complaint, or received the notice required to be sent him by mail, or otherwise brought into court, and such person, his heirs, devisees, or personal representatives, as the case may require, shall, within ninety days after notice in writing given him of such decree, or within one year after such decree, if no such notice shall have been

-ministration of the color of the color of American provider

• An actorio intervis type of a line is an ability and antermedial and analysis of a construction of a line is a line in a line is a line in a

in. od ordi čretrio morav na pilo so noidinar solimar sel Predi est a secial est ai ialiar. Net selatio de in red lo legimo a sest Prediare e se abrest er selatio, ndo bo a el la asimo jirosto De la la asimo celos

It further to receive the colling of the property of the prope

្នាត់ស្តី នៅក្រុម ប្រជាជិញ ប្រសាជ្រាល់ ស្រុក្ស បានសមាធាល ស្រស់ ប្រជាជាប្រសាជ សិស្សិស្ «សេសសំណី» ស្រុក ១២ ១១ កាស់សាក់ ភូមិទី១៧ នៃ១០១៥ សេកសំ បានកើត្រ សែសសំណី ២០ ប៉ុន្តែ សេសសំពីស

<sup>(</sup>i) the many of the second of

given as aforesaid, appear in open court and petition to be heard touching the matter of such decree, the court shall upon notice being given to the parties to said suit who appeared therein and the purchaser at a sale made pursuant to such decree, or their solicitors, set such petition down for he ring and may allow the parties and such purchaser to answer such petition. If upon the he ring upon said petition it shall appear that such decree ought not to have been made against such defendant, the same may be set aside, altered or amended as shall appear just; otherwise such petition shall be dismissed at petitioner's costs; provided, however, that if a sale shall have been had under and pursuant to such final decres the court, in altering or amending such decree, may, upon terms just and equitable to such defendant, permit such sale to stand. If upon the he ring of such petition it shall appear that such defendant was entitled under the law to redeem in equity from such sale, the court shall enter its decree permitting such redemption to be made at any time within ninety days thereafter, upon such terms as shall be equitable and just."

The above act takes the place of former Section 19 of the Chancery Act, and the decisions of the courts under the old act are not in most instances applicable to cases coming under the new act.

Nothing appears in the petition which shows that the petitioner was injured in any way or sustained any damage by the entry of the decree; that the trust deed was not a lien or that the amount of the decree is not correct or that a different decree should be entered or that her rights were in any way denied her.

In petitioner's amended petition as heretofore stated she sets forth that in some way she was denied the right to take adventage of Section 74, National Bankruptcy Act, but fails to state in what way the privileges afforded her by that section would be to her advantage.

We are of the opinion that the court was right in striking the petition and for the reasons herein given the order of the Circuit Court is hereby affirmed.

ORDER AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

A CONTROL OF THE PROPERTY OF T

A PART OF THE STATE OF THE STAT

A NEW TONE OF THE STATE OF THE

the state of the few to seek to an about the seek to the few the seek to the seek th

.

CITY OF CHICAGO.

Appellee,

V.

MICHAEL OHLSEN, doing business as M. OHLSEN COAL COMPANY,

Appellant.

23

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

289 I.A. 614

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Nunicipal Court finding the defendant guilty of a violation of a city ordinance and assessing a fine of .25.00 against the defendant. The case was tried before the court without a jury.

The ordinance which the defendant violated provides against short deliveries in the sale of coal by dealers to consumers.

It appears from the evidence that the Illinois Emergency Relief Commission gave an order for 19,000 pounds of coal to be delivered by defendant to ten different persons, nine of show were to receive a ton each and the tenth person a balf ton. An officer from the city followed the wegon and after the nine deliveries of one ton each had been made, the officer directed that the coal wagon be taken to the city scales to be weighed and it was found that there was still 1690 pounds in the wagon, proving a shortage in delivery of 690 pounds.

Defendant claims that he was not short in delivery, but that he was interfered with by the city officer from making the last delivery.

things

E- 1.7. 1. 1. 1.

r vertilaso elle "A TUberta dille. Tuberta diluberta del

of the hard of

BODIA, GIA

e de la companya de l

Park 1 28 18 to 1 miles the large opening a serious section to be with

remonitoria (1) to the line line of a linear transfer of the t

north that illimite a liquid thus was a liquid to the first above with the

produces of the second of the tension of the file of the same of the file of the second of the secon

ed a frequency of the second o

For a sign of the control of the con

This case is controlled wholly by the facts and there is no question of law involved. The presiding judge heard the witnesses and was in a better position to determine the truth of their statements or lack of it and whether the plaintiff proved its case by a preponderance of the evidence, than is a court of review.

We cannot say from a reading of the briefs or the abstract that the trial court arrived at the grong conclusion and, therefore, for the reasons herein given the judgment of the Gunicial Sourt is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

Jacobson Communication of the value of the communication of the particle of the p

La distribution de la companya del companya de la companya del companya de la companya del companya de la companya de la companya de la companya del companya de la companya del companya de la companya de la companya de la companya de la companya del companya de la companya de

that the and is easy to reason, it will ever on our and additionary that seems, the seems, the terms of the control of the con

, the war and an early limite

MARIA STANKE,

(Plaintiff) Appellee,

V.

ARDEN ATHERTON,

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

20 2.A. 614

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court denying the vacation of a judgment entered for the sum of 20,000.00 and costs in favor of the defendant and a pinst the limit. The suit was instituted on or about January 21, 1930, returnable to the March Term 1930 in an action of trespass on the case, wherein the damages were claimed to be \$20,000.00.

It is claimed that the defendant, while operating an automobile, injured the plaintiff. After the defendant had demurred and the plaintiff had changed counsel several times, the cause came on for hearing before Judge Schwabz in 1934, at which time the plaintiff did not proceed with the trial of the cause. The cause was at issue at that time, the defendant having answered that he did not own an automobile at the time it is alleged that he injured the plaintiff. Stephen Atherton, the defendant's son was originally charged with having caused this injury. Judge Johnaba caused the suit to be dismissed as to Stephen Atherton, and it is claimed that at that time the judge ordered the cause to be stricken from the trial call and directed his minute clerk to make a notation thereof and also stated that the attorneys representing the plaintiff should serve a notice upon counsel for defendant whenever they desired to have the cause again placed on the trial calendar.

1.1

district allow

Contract Con

-11

A the second of the second

The first of some to see

Calabara at a sample of

dynek malenen. With an meere process who encount of the last of each gaing of the last of the gaing of the last gaing of the last of the l

It is a factor of the contract of the contract

The case thereafter appeared on the calendar of Judge Frankhauser before whom an <u>ex parte</u> judgment was entered on hovember 26, 1935, in favor of plaintiff for 30,000.00 on the verdict of the jury.

Defendant contends that thirty days after the entry of said judgment an execution was issued and placed in the hands of the sheriff of Cook county and that when he was served with a copy of said execution it was the first knowledge he had that judgment had been entered against him. Defendant filed a petition under the statute in the nature of a writ of error coram nobis to vacate the ex parte judgment and at the hearing on that petition evidence was introduced to show that this cause was stricken from the trial calendar, to be reinstated on notice to defendant, but that the clerk had failed to enter such order upon the records of the court. The trial court, while admitting this evidence, did not think it was competent, but decided to permit it to go into the record for the purpose of review in this court.

As to the weight of the evidence, it is quite apparent that something must have been done with the case by the trial judge when the case was reached for trial. If a case is at issue and is reached for trial, but is not tried, it must be disposed of in some way such as the granting of a continuance, or striking the case from the call, or dismissing the suit or some similar order. Otherwise, the status of the case would be left in a state of uncertainty.

Then the cause came my before Judge Frankhauser the plaintiff appeared, but the defendant did not appear. A jury was called, testimony heard and a verdict returned for \$20,000.00 in favor of plaintiff. At that time it was the practice in the courts to prepare lists of cases under the direction of the executive committee of the court which included all "cases then pending" and to assign said lists to the judges by numbers 1 to 13 and from this list the trial judge, after the list was assigned to him, would make up the trial calendar upon

jud and a construct in the control of the control o

The order of the state of the s

-initial for each original or on the environment of the contraction of

notice being served on the opposing counsel for that purpose.

The evidence here shows that on July 15, 1935, the executive committee of the Superior court entered an order the pertinent provisions of which are as follows:

"IT IS CROSSED BY I'LL ALLCUTIVE COMMITTED that the Clerk of this Court be and he is hereby directed to reassign all pending and undiscosed of common law jury cases as of Saturday, July 13, A. D. 1935, in rotation to thirteen (13) common law jury Lists (leaving off the names of the Julges to whom the said Lists have been assigned, and Lists to be known by number only); provided, however, that all common law jury and nonjury causes that have not been noticed for trial within two years from the time of their commencement or from the date of the last order entered therein, as of Saturday, July 13, A. D. 1935, shall be placed on a Special Common Law Calendar.

Rule 22 of the Superior Court provided:

"Sec. 1. Each Judge, from time to time, shall cause to be prepared a trial calendar of causes assigned to him which have been noticed for trial in the manner hereinafter stated; and no cause shall appear on the trial calendar of any judge which has not been so noticed for trial.

Sec. 2. At any time after a cause is at issue either party may serve upon the other a notice to the effect that he desires the cause placed upon the trial calendar of the Judge to whom the cause stands assigned. Such notice, with proof or acknowledgment of service, shall be filed with the minute Clerk of the Judge, or during the Summer ecess with the Clerk of the Court, within five days after its service. In other respects such notice shall be governed by the provisions of Rule 17 so far as applicable."

It must be at once apparent that it was intended by the rules of the court and the order of the executive committee that no case should be placed upon any trial calendar until notice had been served on the opposite counsel. To hear a cause without permitting each side to have an equal opportunity to be heard, in the absence of negligence, could not be construed as evenly administering justice. Where parties to a law suit file their plendings, employ counsel and have been guilty of no negligence, courts should be difficult in seeing that no advantage is taken by one side over the other. It is true that in order to dispatch the business of the court in centers of large population, it is necessary to be insistent that trials take place at the time set for same, otherwise court calendars would become congested.

; bilings to the period of the real policy in the conduction

The second secon

A PRODUCT TO A STATE OF THE STA

Counsel for plaintiff contends that one cannot prove the misprision of a clerk by oral testimony. While it is true that courts are strict in not permitting orders to be changed, altered or entered by oral testimony, there is no rule which prevents parties from showing what actually happened in court if they do not seek to change an order already entered or ask for an order to be entered.

In the instant case we do not believe that the trial court knew that the executive committee had entered an order assigning this case to a list for trial which could not be tried without notice. No notice thereof appears in this record and if the trial court had known no notice had been given, it would not have entered a default judgment.

On the hearing of the petition in this case apparently the court felt that thirty days having elapsed, he had no jurisdiction to hear this petition. In a proper case, under the practice in this state, the courts are not so limited. As was said in the case of The People v. Long, 346 Ill. 646, at page 650:

"Errors of fact which could have been availed of on a writ of error coram nobis can now be availed of under a motion or petition filed pursuant to the provisions of section 33 of the Practice Act. The motion is an appropriate remedy in criminal cases as well as in civil cases. It not only lies to set aside a conviction obtained by duress or fraud, but it also lies to correct some excusable mistake or ignorance of the accused, where, without negligence on his part, he has been deprived of a substantial defense which he could have used at his trial. People v. Crooks, 326 Ill. 266."

That no notice was given after Judge Schwabs ordered the case stricken from the calendar and the placing of the case upon Judge Frankhauser's calendar in violation of section 4 of rule 22 of the Superior Court, were matters of fact not appearing upon the record. It was proper to show what had happened before Judge Schwaba, or at least what defendant believed had happened, as an error of fact unknown to Judge Frankhauser at the time he rendered the judgment.

As was said in the case of Assenthal v. 31d, 252 Ill. App. 383,788:

All form in the number of the control of the contro

dustriant to the second of the contract of the contract of the second of the contract of the second of the contract of the con

The first state of the control of th

The source the entential and the content of the content of the content the content of the conten

"The fact which was unknown to the trial judge was a misprision of the clerk in not, under the order, striking the cause from the short cause calendar, putting said cause

at the foot of the docket.

In Chapman v. North American Life Ins. Co. 292 Ill 179, it was held inter alia th terror in the process or through the default of the clerk, which is not sufficient to preclude the judgment, but which was unknown to the court at the time the judgment was rendered and does not appear on the face of the record is sufficient to reverse or recall the judgment under a writ of error coram nobis. The error of the clerk in not having placed the cause at the foot of the docket was an error of fact unknown to the trial judge at the time of the trial when the judgment was entered. Cramer v. Illinois Cramer v. Illinois Commercial Men's Ass'n., 260 Ill. 516. In Brady v. Washington Ins. Co., 83 Ill. App. 380, it

was said:

'A default of the clerk is one of the recognized grounds

for a writ of error coram nobis. \* \* \* In Holbrook v. Lawton, 207 Ill. App. 497, the court said: The tendency of the law in this State is to allow the motion under section 89 whenever it is obvious that the action of the court is based upon the fault (either of omission or of commission) of the clerk of the court. "

The facts urged by the petitioner in his petition are that the defendant was not driving the automobile involved in the accident in question and was not the owner of the automobile and that the said automobile was not being driven in furtherance of defendant's business; that defendant was not riding in said automobile and had nothing to do with it.

We think the facts in this case bring it within the purview of the act passed by the General Assembly in lieu of the writ of error coram nobis, Sec. 200, Chapter 110, Ill. Bar Stats. 1935, and we think the judge should have exercised his discretion and set aside the judgment and permitted the defendant to have his day in court and in denying the relief prayed for in the petition committed error, Sufficient are shown by the petition to entitle the defendant to be heard in his own defense, no negligence being attributable to him.

As was said in McMurray v. Peabody Coal Company, 281 Ill. 218, 226:

"We think plaintiff in error has in this case shown a reasonable excuse for not being in court at the time judgment was entered; that it had a meritorious defense and used due diligence in presenting its motion, and that there was an

អ្នកស្តីការ ឬប្រ ប្រើបាលនិង។ ជា ប្រជាជា ។ នៅ ស្រី ស្រី ស្រី មិន មិន ប្រើបាលនិង អ្នកស្នើ។ មិន ស្ត្រី ប្រជាជិធិ មិន នៅ និងប្រជាជា ១០១០ និងប្រជាជា ប្រធាន និងប្រើបាលនិងប្រជាជា ប្រជាជា ប្រើបាលនិងប្រជាជា ប្រធាន អ្នកស្រី ប្រើបាលនិងប្រជាជា ប្រធាន អ្នកស្រី ប្រធាន ស្រី ប្រធាន អ្នកស្រី ប្រធាន អង្គបាន ស្រី ប្រធាន អង្គបាន ប្រធាន អង្គបាន ស្រី ប្រធាន អង្គបាន ប្រធាន អង្គបាន ស្រី ប្រធាន ស្រី ប្រធាន ស្រី ប្រធាន អង្គបាន ស្រី ប្រធាន ស្រី ប្រធាន ស្រី ប្រធាន ស្រី ប្រធាន ស្រី ប្រឹក្សា ប្រធាន ស្រី ប្រធាន ស្រី ប្រធាន ស្រី ប្រធាន ស្រី ប្រធាន ស្រីប្រធាន ស្រី ប្រធាន ស្រី ប្រធាន ស្រី ប្រធាន ស្រីប្រាស់ ប្រធាន ស្រីប្រធាន ស្រីប្រឹង ប្រធាន ស្រីប្រធាន ស្រីប្រឹងប្រធាន ស្រីប្រធាន ស្រីប្រឹងប្រធាន ស្រីប្រធាន ស្រីប្រសាធ ស្រីប្រធាន ស្រីប្បាន ស្រីប្រធាន ស្រី

LIBET II. KAN BE THE BUT OF A THE BUT OF THE

is not the contract of the con

AMBAYAN YAN YAZI 6. AMBAN AMBAN MANAZIA CIKILI M

Hatte of walls and a cold of

GEORGE A. TETZLAFF, JR., a minor, 5 years of age by his father and next friend, George A. Tetzlaff,

Plaintiff - Appellee,

7.

EDWARD E. LICKTON,

Defendant - pellant.

25

APPEAL FROM

SUPERIOR COURT.

COOK COUNTY.

289 I.A. 614

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court granting plaintiff a new trial. The cause was one for personal injuries sustained by the plaintiff George Tetzlaff, Jr., a minor, he having been struck by plaintiff's automobile. The verdict of the jury found the defendant Edward S. Lickton not guilty.

Defendant testified substantially as follows: That he is a garage owner and that he was driving an automobile west on ashington Soulev rd in Oak Park, Illinois; that he and lived in Gak Park for fifty years and was familiar with the fact that at the northeast corner of Clinton street and assington boulev rd there was a school and that children passed back and forth across Clinton street on their way to school; that on November 7, 1934, he was driving an Oldsmobile sedan; that as he approached Clinton street he saw 14 or 15 women and children, one of whom was the plaintiff aged five, and they were at the crosswolk walking across ashington Boulevard; that he stopped his car at Clinton street but started it again and ran over plaintiff; that "they", meaning the women or some of them, told him or signaled to him to go ahead so that they could cross after he went by; that no policeman and there to direct traffic; that he started up his automobile and the plaintiff jumped in front of it and the car ran over him.

It is claimed by the plaintiff that when defendant's automobile stopped, the boy continued to cross the street, whereupon

\* 12 Line + 1 ( 1900)

and the property of the control of t

19 AL 00

The field the second of the se

and the contribution of th

Hith in this was a low Wilderfally and you will be side.

Let of the interpretable of Commission of I are the other allesses as

defendant sud enly started his automobile and struck the boy which resulted in seriously injuring him.

On the motion for a new trial plaintiff called the attention of the court to the fact that the verdict was against the manifest weight of the evidence and that error was committed by the court in refusing the following instruction to the jury:

"The defendant in operating his automobile was required to exercise ordinary care for the safety of the plaintiff, and the fact, if you find it to be a fact that some person not a police officer or other official authorized to direct traffic gave a signal to the defendant, and the defendant acted upon the same and thereby injured the plaintiff, such signal, if any, would not relieve the defendant from limbility if he was negligent as charged in the plaintiff's complaint."

It appears that the defendant, over the objection of plaintiff and the rulings of the court, insisted in getting before the jury the fact that some unnamed person told him or motioned for him to go sheed. This conduct on the part of the defendant in not complying with the rulings of the court occurred several times during the trial.

From the facts before us we are of the opinion that the trial judge in the exercise of his discretion was justified in granting a new trial.

For the reasons herein given the order of the Superior Court granting a new trial is hereby affirmed.

ORDER AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

india (store a lever elever) elever el come a le releta de la come La come de la come de

energe e en la compacta de la la la compacta de la compacta del compacta de la compacta del compacta de la compacta del la compacta del la compacta del la compacta de la compacta del la compacta del

gram i de la la companya de la compa

ា ស្រែក ស្រាស់ ប្រជាជា ស្រែក ស្ ស្រែក ស ស្រេក ស្រេក ស្រែក ស្រេក ស្រែក ស្រែក ស្រេក ស្រែក ស្រេក ស្រេក ស្រេក ស្រេក ស្រេក ស្រេក ស្រែក ស្រេក ស្រាក ស្រា

In a little of the control of the co

en i ni pela la ceta di la compressión de la compact. - La se al elemente de la calcalacación de la completación de la comp<mark>eta de la completación de la completación</mark>

t ind de west feu (och en en en eine sieren oberen ods moc "en ein en gemmen bis wegen bee enstade to dage "enterste (och eu

38754

LARS LINDQUIST,

Plaintiff - Appellee,

V.

HERMAN L. SCHMIDT and AUGUST SCHMIDT, doing business as SCHMIDT BROTHERS GARAGE,

Defendants - Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

289 I.A. 614

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment of the Circuit Court of Cook County against them for the sum of 15,000.00. The action is based upon a charge that plaintiff suffered severe injury in an automobile collision, as a result of defendants' negligence. The grounds urged for reversal are that the plaintiff was guilty of contributory negligence at the time and place in question, that the verdict is excessive and contrary to the manifest reight of the evidence, that in the trial of the cause, laintiff's counsel was guilty of misconduct in the examination of witnesses, and that the court erred in refusing to give certain instructions offered by defendants.

The record indicates that at about 7 o'clock on the evening of becember 11th, 1933, plaintiff was riding in a car driven by his brother, Oscar Lindquist, in a southwesterly direction on archer Avenue in the Village of Justice Park, which lies southwest of the City of Chicago. The testimony of Oscar Lindquist, the driver of the car, is to the effect that he, the plaintiff, and another person, were proceeding in an automobile along the masterly lane of the two lane highway on Archer Avenue, at the rate of about 35 miles an hour, with the lights lighted on their car, so that he could see a distance shead of 35 to 40 feet, and that the road shead seemed to be clear of any obstruction; that it was dark at the time, and that suddenly an object mulled across the road in front of the Car; that the car which he was driving, struck this object which

en ' while the st

3 11 1

J. (1970) LATE OF LOW SERVICES THE SERVICES

e all has the above the control of t

210 11 083

As to the second of the case o

The company of the control of the co

pulled across the portion of the road my upon mich he may driving, that he afterwards learned / was a truck; that the car in which the witness was driving struck the front end of the truck and was thrown off to the right side of the road and onto the street of r track, which is parallel with the roadway; that at this time there was no light, headlight or signal "snowing toward us"; that the night ass foggy and dark, that the road was dry, and that when he first san the truck, it was 8 or 10 feet in front of him. Praintiff testified, in substance, that at the time of the accident, he was riding in the front seat of the car with his brother User, and that another man was in the back seat; that the truck with which they collided was a tow truck, which, at the time of the collision, had just pulled over the black lime in the center of the roadway, three or four feet; that up to the time of the collision, he, whintiff, had not seen the truck nor any lights therefrom, nor had be seen any signal or flash light exhibited by anyone in the neighborhood of the truck; that he afterwards learned that the truck's headlights were shining away from the direction from which the cer in which the plaintiff was riding, was proceeding; that as a result of the collision, he received a cut on his fingers and on his head, and that he was taken to a hospital, where he was attended by a physician.

The evidence indicates that the defendants operate a garage a short distance southwest from the place where the accident occurred, and that shortly before the accident, they had been notified that an automobile had gone into a ditch on the sast or opposite side of archer avenue from the point where the accident in question occurred; that the point where this car was in the ditch was about 400 feet away from defendant's garage, and that one of the defendants took his tow truck to this place. The defendant, august Schmidt, testified that his tow truck is about 11 feet in length, and that upon it at the time, were two headlights, with three green lights in front and four red lights in the rear. This

emisser in a control of the property of the section is a section of the section o **That** we common that managed the best plants that the extremely <mark>i (</mark>inaugini), di mmo ili, avalikasi kibalika Senadi eti kalika <mark>ja isa of 190</mark> HE STATE OF THE BEST OF THE STATE OF THE STA ត្រូវ គឺស្រារីស្រាស្ត្រី ស្រាស្ត្រី សុខ ការា សុខសុខ សុខ ស្រាស់ ស្រាស់ សេច និង និងសេសសំ **្**បីស់ទូដំរើ क्षा इनको १८८५ । अस्ति the truck, it is a contact and section is a contact of interpretation ender American en la completament de la completation de la completatio entra de la compania de la composición and one footalises within a filter the end to be form for the form <mark>ಿಯ ಸ್ಥಾಪಕ್ಷಕ್ಕೆ ವಿಶ್ವರಣಕ್ಕೆ ಸರ್ವಿಸುವೇಶವಿಲ್ಲ</mark>ರು ಅವರ ಅರ್ಥ ಸಂಪ್ರಕ್ಷಕ್ಕೆ ಕಾರ್ಡಿಸುವ ಸರ್ಕೆ ಕ್ಷಣೆಗಳಿಗೆ **ಜನ್ನ** ್ರಾಯ ಪ್ರಕರಣ ಸುವಿದಿ ಕಲ್ಲಿ ಅದನ್ನು ಸಂಪತ್ತಿಗಳು ಸರೀಧಿಕ್ಕಾ ಸಿಲ್ವಾಗ್ಯ ಸಂಪರ್ಕಕ್ಕೆ ಸುವಿದಿಗಳು manjaumon - Ironed end in distrete a la reside a la majordoro end which is the first tension of the property of  $x \in \mathbb{R}^n$  and  $x \in \mathbb{R}^n$  and  $x \in \mathbb{R}^n$  and  $x \in \mathbb{R}^n$ that is due to the same that one because it is also the particle of the same o delinity or side or consider the side of t 🔐 ಕ್ರಿಕ್ಸ್ 💎 ಇಂದರ್ಗಳು ಕ್ರಮಾಸ್ಕೆ ಬರುಗಳು ನಿರ್ವಹಣಗಳು ಕ್ರಮಾಸ್ಕೆ ಕ್ರಮ್ ಬರುಗಳು ಕ್ರಮಿಸ್ ಕ್ರಮಿಸಿ ಕ್ರಮಿಸಿ ಕ್ರಮಿಸಿಕ್ಕೆ ಕ್ರ

e refress and find the back down the plant of the second second and the second second second second second second second second and the second second

defendant also testified that we maked the too truck up to the southerly side of orcher ovenue in order to hook a chain over the car which was then in the ditch, and that at that time, no part of his tow truck was over the black line running along the center of the highway; that the motor of the tow truck are running, that a police officer who stood about 50 feet away from him on the pavement had a flash light, that another man had a flash light a short distance from his car, and that both of the flash lights were lighted and shining; that the car of plaintiff case along at a pretty good speed, crossed over the black line, and run into the tow truck. The evidence of all the witnesses to the accident indicates that shortly prior to the accident, the lane in which the car in which plaintiff was riding, was clear.

Robert Graham, a witness on behalf of plaintiff testified, in substance, that he resided in and ame a trustee of Justice fork: that he was a machinist, that he was friendly with the delendants. and that he was familiar with the locality where the accident took place; that on the evening of December 11th, 1933, at about 7 o'clock he stopped his ear at the garage of the defendants to purchase gas, and thereafter turned into Archer Avenue and was proceeding northeast along the right hand roadway of treher wenue; that he then saw a tow truck getting ready to pull a car out of a ditch; that at that time, his car was headed northeast, and the tow truck was directly across the roadway upon which he ma proceeding, which crused him to stop; that at that time, the back of the tow truck was towards the east and the front towards the west, and that he saw people standing around, but saw no lights; that the tow truck backed off toward the east edge of the road to pull the car out of the ditch, and that he heard someone say, "Give it the gas"; that the tow truck then give a tug and bulled over about four feet, that at that moment, he heard a crosh, and that at that time, the tow truck was over about four feet in the right hand or opposite

 The ST State of Control of the control of t to included the control of the contr ្ត្រាក់ក្រុម បានប្រជាជា ប្រជាជាក្រុម នៃក្រុម នៅក្រុម មានក្រុម មានក្រុម ប្រជាជាធិបាន បានប្រជាជាក្រុម ប្រជាជាក្ tinim untilamenta mantin più con più ette il servici e personalità il tre mati dista da con Late to Transplanting Configuration on the street was the things for the configuration. 🗼 j provincent kaj mila nesto. Dan ji, most no sem a nesto bela logioda en <del>-ของสองสารคลิติการอากา (ค.ศ. 194</del> - พระการ (ประสารกับประสารใช้ และหลักและหลักและหลัง โดยกั ណាល់វា ១៣ ឆ្នាំ ២០ ខ្លួនសុខ ១ ២០៨៦ ១ ២០ ខ្លួននិង១៩ ម៉ាង១៩ និងប្រើបានសុខ ប្រាសារីម និង១៩ Long transfer on the control of the co A COMPONION RATE OF A SECURITION OF SECURITION OF THE SECURITIES O This polices on the bile of the control brown ginemia I'm en la lace of the control of the control of the second and the first of the state of t ment i a a cart la recolação de como toda gênera e publicada de Espain e es in the district facts of fine order to take the action of the tecloral the ditch, and had be not as weather to them it and a post of edness which down the many the state of the state should not odd in the grantee contact of the ending of the ending the end of the contact of the

plint. A so in a driving out all word need trade grows on, moved wor

lane of the highway of .reaer .venue; that the crash was caused by a collision of a car that was coming from the northeast, with the truck, and that at that time, the tow truck was in front of the witness and on the wrong side of the ro d, that it blocked the lane upon which the witness was driving and about four feet of the southwest lane: that at that moment, the truck was between his car and the car that was coming from the northeast; that he knew both user and Lars Lindquist; that after the accident, lars Lindquist seemed to be scared and shaken, that his hand was cut, and that he was holding his hand up to keep the blood back; that he, the witness, got his own flash light, which was the only flash light there at the time, looked into the wrecked car and saw a man bleeding to death on the floor of the car in which the Lindquists were riding. This was the person who rode in the rear seat of the car in which plaintiff was riding, and who was killed by the collision. On cross examination, Graham stated that "The truck moved forward across the road, that the crash came just a little after the truck made a lunger, and that he did not detect any intoxicating liquor on the Lindquists: breath, and that neither of the Lindquists showed any evidence of being intoxic ted. This witness also stated that after he had stopped his car, because the roadway on which he was proceeding, was blocked, and just before the collision, he saw three or four men just walking around,

Anna Graham, the wife of the last mentioned witness, testified that she was riding with her husband in his car at the time
of the accident; that the night was hazy; that she saw no flash light,
lantern or other signal to any car coming on the highway; that she
saw a car belonging to a man named Chernaukas with one bright light,
which was shining west towards the Johnidt garage, and that this
light was near the gas station, and that this was the only light
she saw; that just before the accident, she heard the expression

The state of the s True is the company of the control o minimum and the contract of th - and the second of the second I for the form and a second of the second of the form of the second of the form of the second of the and received the first of the second grown in the second to get the limited project. THE THE A COUNTY OF A COUNTY OF A COUNTY OF A COUNTY OF THE ACCORDANCE OF THE COUNTY O the based of the sample bring and the companies of graduate and a control despite for Discharge and the entropy of solds and be introtain do dá sin cir geille a seu - e o o ten suspens e A pairi beideol the wise exciping the strength with this countries and in recall entral to a transfer of the activities of the specific and the service of the services. ertymosia namo iko na mosa zavem noit posto kaze kná<u>e, jaula</u> girmystr market linett over the state of line and mile the second free. folklymenil for my boundlegrie election to the dome en bit to consider ing community of the co Design fait fid with the brack to be a long particular of the street of the first and state out that for the street of the state of the street o √សំពេលបាន γ្យស់នៅលើកាន់ និង្សា<mark>រ៉</mark>ូ

ritor, or realizable in a notice the second control of the control

"Give her the gun"; that the motor of the tow truck started, and that the tow truck then sent over into the right hand lane of the roadway, and that she then heard a or sh. On cross examination, this witness testified that she saw the plaintiff after he got out of his car, and that he was bleeding from his head; that at the time of the accident, it was "getting dark and getting ready to snow".

A police officer of the Village of Justice Park, produced by the defendants, testified to the effect that on the night of December 11th, 1333, he received a call that a car and in a ditch, and that he went over to the place where this car was with a man named Chernaukas; that the defendant's too truck arrived upon the scene shortly after the witness; that he saw four or five other parsons there; that it was a clear night, not foggy but dark; that the tow truck had two headlights, three red lights and a tail light, all lighted. This witness then described what was done in connection with the tow truck in making preparation to bull the cor out of the ditch. He testified that he heard the roar of a car coming from the northeast, and that when he first saw it, it was 150 or 200 feet from where the witness was standing, which was near the tow truck, and that this car was then coming at a speed of about 45 miles an hour; that the witness rushed up and reved a flash light, but that the car referred to did not slow up; that he then heard the crash, and that this car ran right into the side of the tow truck at the cab, and went off of the road to the right and into the ditch; that Oscar Lindquist had liquor on his breath, and that the witness took him over to the station and locked him up and sent for a doctor to examine him. On cross examination, this witness stated that just before the collision, he was flagging traffic coming from the southwest, and that he was about 8 or 10 feet southwest of the truck. doctor, referred to by this witness, was not produced at the trial.

Several of defendants' witnesses testified that after the

The first off the first officers of the first officers officers of

motor ( ) in the first of the second of the modern second of to thought a service to the element of a different **a** leaf to the break two penditor and provide a control of the control of th many of the second of the second of the text and the first ban The Board Edwin of the compact of the compact with a compact position of the compact of newstr. Magi awdi so o o with the formula a safet till some ្នាស់ ១៩៩ គ.ម. រុះមិន ១៩៦ ខ្លាស់ ។ ភូមិស្រាស់ ១៩៣ គ.ក.មិរី កំពង់ថា ខ្លាយក់បឹ ្នាក្សី ខ្លួនក្រុមិន និង នេះ ក៏មាននេះជាដាន់ក៏ទស់ ខាន់ការ៉ា ភូគិទីការ៉ាន់ ការបាន ជានេះ គឺនេះសម្រាធ់ ·1. 11 4 · 1. 4 · 1. 4 · 1. 4 · 1. 4 · 1. 4 · 1. 4 · 1. 4 · 1. 4 · 1. 4 · 1. 4 · 1. 4 · 1. 4 · 1. 4 · 1. 4 · 1. und to the entry the control of the entry of the entry of the entry of the entry of the diton. ... kirkirii ka mar rijuktiri mar na kaliningan. tion and the sound of the section of reacht au each were in reacht of 121.20 in the content of the cold area of The gold to the control of the contr ត់ ខ្លាក់ព័ន្ធកុរ៉ារ៉ា (មករាក់កត់ស្គាល់ សក្រក់កក់កាល់ ការសេសភាពិសាលក់អាចកំនុង**ប្រ**ប ,对表示是不一定的 "The including the including" and the control of the co Program Didition Library Committee of the Committee of th • Problem of the state of th part, la attron nafé cira di lituri un arcus de principal eminent ing 🗼 g ing ing ga da addawar anda All me P dawar - 😻 di e San 🚜 dawar decreas a common to til pilita pilita por men consciención por la merencia e tactory ng entre de on emitirant renewair leterbroken (. Lerbyce

tow truck was placed in position to pull the car out of the ditch, and prior to the collision, it had not moved. Others testified that it moved about one foot. Several witnesses produced by the defendants testified that just prior to the accident, a man was standing on the right portion of the highest, and near the truck, signalling with a flash light in the direction from which the car in which plaintiff was riding, was proceeding. One of defendants witnesses testified that the nearest street light was about a block from the place where the accident occurred. The testimony of all the witnesses indicates that the front lights on the tow truck were directed away from the direction from which plaintiff was proceeding. Oscar Lindquist, the driver of the car, admitted that he had had a drink a short time prior to the accident, but denied that he was intoxicated.

Dr. Paul Headland testified, in substance, that he first attended the plaintiff of the Little Company of Pary Tospital on December 12th, 1933; that he found an injury to plaintiff's scalp on the left side, which he described as a long lateral incised wound, a cut extending from the posterior edge of the temporal on through and across the parietal, two and a half or three inches long: th t the wound went down to the scalp and was bleeding, that he cleaned the wound out and cauterized and sutured it; that he found a lacerstion of plaintiff's left hand extending across the back of the middle portion thereof, that the hand was badly torn and cut and involved the skin and tissues below, down through the tendons; that the tendons controlling the middle and ring finger were completely severed, that he cleaned the cut and sewed the ends of the tendons together, but that they did not stay together and that regeneration occurred, which was a very slow process; that the plaintiff was under his care until the first of the February following; that the wound in the head healed and caused no further trouble, and that there was no evidence of

The control of the co

and the state of the process of the contract o no indited to the group of the remarkable is the isincular and the state of the second projection in the second of the second projection of the second of the s Franco Paris I Irra a president Daylorana il region galla decembra i about in followers to be a selected by the selected control of the selected by From the million server in the contract of the contract with the server of the contract of the The street Add ( Association for When I is a red draw Emission end 🗝 garia 🗀 Paga na na ina ng 1 da a pila a pila na a langga at paganangan dalah kanangan dalah 🚾 🕹 🗎 id with the first of the country of the control of the state of the state of the costs. The million of the first that the first of the first of the first product of the first of the fi partial of the training producted and the contracting product approximation made with in the control of the ្នាល ត្រូវទៅក្នុង សំខាង សំខាងសម្រាប់ កិច្ច ប្រជាពលរបស់ សិក្សាលា សិក្សា សំខាង សេក្សា និងការការ**ខែ ១៧** that they did not see the budgeth of the contract of the contract is figur to a bid warm . The introduction of payment of the west of the second control of t the Sires of the foreing Jeans inn; is the foreinfile to the tention that the tent of to consider an interest of the prince of the

skull fracture, and only a mild degree of concussion. He also testified that the plaintiff complained of pain as a result of the laceration of the scalp. This doctor further testified that there is always some abnormal situation following any suturing of tendons, because of the forming of some tissues and that after the healing of such an injury, there is not the same smoothness, nor does it perform the same functions; that when he last examined the plaintiff, there was evidence of some tissues, and that as a result, the hand could not be properly closed, that although the fingers could flex, they could not do so completely, and that his estimate was that there was approximately two percent impairment of flexion. This doctor testified that the fair charge for his services would be 150.00, but that in this case, he only on red \$51.00, and that the hospital charges were \$3.00 per day.

As to the extent and effect of his injuries, plaintiff testified, in substance, that he is a bricklayer by trade; that after his injury, and about the first of arch following, he attempted to resume his work, but that his hand got so stiff that he "couldn't keep it up"; that at that time, he worked for bout twenty minutes and stopped, that he tried to do this work again about four months previous to the trial and that his hand " ot stiff every time", and that before the accident, he had no trouble in laying brick. On cross examination, he testified to the effect that after he quit laying brick, he did labor work, such as shoveling, that he had been shoveling mortar and that he worked as a bricklayer's helper, handling morter and mixing morter with a hoe, that after he mixed the morter, and then conveyed it he used a shovel and placed it in a wheel berrow/to the place where the bricklayers used the mortar. He further stated that four wonths prior to the trial, he attempted to lay brick again, but that his hand did not respond to the handling of the brick, so that he was compelled to go back to the business of mixing mortar.

Shall in trues, and only the control of the control

proving a design of the color o

egricon mirin to essented ear of it i og at inligace

Defendant complains of four instructions tendered by his counsel and refused by the court. They are numbered 1, 3, 3 and 4. Instruction, No. 1, is so inartifically and carelessly drawn, that, therefore, it was properly refused. Instruction No. 2 is as follows:

"This court instructs the jury that the statute of this state provides that no person shall drive a motor vehicle upon any public highway in this state at a speed greater than is reasonable and proper, naving regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person."

This instruction is apparently predicated uson the theory that the evidence establishes the fact that the driver of the cor in question, at the time and place in question, drove the car "at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person", when, as a matter of fact, there is a contrariety of evidence as to whether the car in which plaintiff was riding, was being driven at a speed of from 30 to 40 miles an hour, or at a much greater speed. If this instruction is intended to instruct the jury as to the contents of Jection 324. Chapter 121, Illinois State Bar State, 1935, which defines xxxxxx the reasonable speed for automobiles under various circumstances, it is lacking in many material respects, as a perusal of the statute will indicate. Instruction No. 3 offered by defendent. which the court refused and to which refusal defendant objects, contains the following:

"If you believe from all the evidence in this case that the motor vehicle in which the plaintiff was riding at the time in cuestion was being driven on a public highway in the State of Illinois and in violation of the statutes of Illinois regulating the traffic of vehicles upon such streets and highways; and if you further believe from all the evidence that the plaintiff knew or, in the exercise of ordinary care on his part could have known, of such violation of the law by the driver of the vehicle he was riding in a sufficient length of time before the collision here in question to have cauthoned the driver of the automobile plaintiff was riding in not to violate said statutes, or to have prevented said driver from violating said statutes; then the court instructs you that so driving said vehicle in which plaintiff was riding contrary

To mand y such a proper new standard struct sind?

Helder Andrew Clare we was a reference of a state

Before a recommendate was young the subject of a reference of a such a state

of force of a such a great of the such as a subject of a state of a state

tift i finit grate. It is a list of office, while means at more time wift mi per qui a comina no della posta a descissi del annelita ownsbien, it the time on a called grant of our the or o ees es in the in the property of the common of the end mistry beace traffic and the traffic of the engine of the second respectively To mention that family "the transfer for land can had being an emiliar ri vro sufference to a sens into the transport of the ord transport of transport of the ord transport of the ord transport of transpo with the beauty of the contract of the contract of from Mi \*\*\* #1 which the second of the second obtains of the interpret dion is intended to inecture our payers or armits of the 374, Charter 131, Illiania lote are tota, will, mide delines -ample and the release of the state of the s stances, it is I caling in any definite or a wing to a menant to desire the branches of all militerations. The second like the out on our <mark>, não l</mark>ike do karedi liveres union of la electric ancomad<mark>a esián</mark> contrale the delicatories:

If you salions found it the eviloner is the contract by the time of selection of the contract of the contract

9

to said statutes raises the presumption that the plaintiff and the driver of the motor vehicle in which plaintiff was riding, at the time and place in question, were, as a matter of law, guilty of negligence; and if you further believe from the evidence that such negligence was the proximate cause of the injury to the plaintiff, without which the injury would not have happened, then you should find the issues for the defendants."

This instruction does not pretend to state what the statute provides.

The only method by which the jury could determine whether the driver of the automobile in which plaintiff was riding, was, or wis not, violating the law at the time and place in question, would be for the jury to take a copy of the statutes of the State of Illinois with them into their jury room, and then determine, after reading it, whether or not the driver of the car in which plaintiff was riding, had, by his manner of driving, violated the provisions of such statute. Instruction No. 4, which was refused by the court and upon which action of the court defendant assigns error, is as follows:

"You are hereby intructed that before the plaintiff can recover in this case from the defendants, he must prove by the preponderance or gre ter weight of the evidence that the defendants! driver had notice, or by the exercise of ordinary care, could have had notice, of the dangerous position that plaintiff was in, long enough before the accident was inflicted to enable the defendants! driver to form an intelligent opinion as to how the injury might be avoided and apply the means for avoiding such injury. If you find from the evidence in this case that the defendants! driver did not have such notice, and by the exercise of ordinary care could not have had notice long enough before the plaintiff was injured by the automobile truck to form an intelligent opinion as to how the injury might be voided and apply the means of avoiding it, then you are instructed that the plaintiff cannot recover."

This instruction was evidently lifted bodily from some opinion, and has no relationship whatever to the facts in the case at bar. There is no suggestion in the evidence that defendants! truck was being driven along a highway. On the contrary, all the witnesses testified to the effect that immediately before the accident, the tow truck was standing still, and that if it moved at all, the extent of its moving was from one to four feet.

Upon the question as to whether or not plaintiff was guilty of contributory negligence, and whether or not the verdict

ិស្សាស្ត្រីនេះ ប្រជាពី នៅ អាស៊ីស្រាស់ នេះ នៅប្រជាពី ប្រជាពី ប្រជាពី នៃទី២០ ខេត្ត នៃ មានប្រជាពី នៃ នៅក្រោយ នេះ និង ប្រជាពី នេះ នៅក្រោយ នេះ និង ប្រជាពី និង ប្រជាពី នេះ និង ប្រជាពី និង ប្បាធី និង ប្រជាពី ប្រជាពី និង ប្រជ

This limiteties for the new or of the feet of the respective services. The ealsy stands in this is described in this is a feet of the respective services and the following of the easternality in this is a feet of the relation of the earth of the relation of the earth of the relation of the feet of the relation of

Place in the control of the control

This ingresors on a switching direct contact contact contact of the contact of th

e a littate of the toutous and the complete of the state of the state

is contrary to the annifest weight of the evidence, we again call attention to the following: The driver of the car and the plaintiff both testified that they were driving in the right hand ro dway of the road, which appeared to be clear, and that suddenly the truck moved over into this roadway without warning, and th t they crashed into it. Two apparently disinterested witnesses testified that they were standing still watching the oper tion of pulling a car out of the ditch, conducted by defendants, when, at the command of someone, the tow truck suddenly started and bulled into the opposite roadway about four feet, and that they immediately thereafter heard the crash. witnesses for the defendant, as already stated, testified that if the car moved at all, it did move more than a foot. Witnesses for the defendant also testified that signals were given to warn the driver of the car in which plaintiff was riding, and other witnesses testified, just as positively, that no such signals were given. Because of the contrariety of the evidence upon the issues involved, the questions as to whether the driver of the car was guilty of negligence or not, whether plaintiff was guilty of contributory negligence or not, and whether defendant's act in moving the tow truck was or was not the proximate cause of the injury. were all questions for the jury to consider and determine from the evidence submitted. On the question as to the misconduct of counsel for plaintiff, we have carefully examined the record, and we find nothing in it which would justify a reversal. Morever, a creful perusal of the testimony of both the attending physician and the plaintiff leads us to the conclusion that the verdict is excessive. Dr. Headland, as already stated, testified, "I would guess approximately there was a two per cent impairment of flexion there - two per cent missing. In time we always hope it will be completely overcome. There is no possible way of telling." If " remittitur of \$1,500.00 is made from the amount of the judgment within ten

1.5

in the state of the second of the second of the state of the second of t Tittal ... ter eine eine eine auch eine eine eine eine 100 auf eine interiore ស្តាមស្រាយ ស្រាស់ សីសុទ្ធិសា មេសា សារ៉ា សេដ្ឋាយីសាស មាន បង្គ្រាលីស្រាប់ ស្ត្រា សាននិងដែលសេ**ន នៅនិសា**ស off the garage of the grown of the term of the grown to gr d p d'a la granda l'aredan l'illina da al a desa mara sorran l'areda ា អ្នកស្រាស្ត្រស្រាន់ ខេត្ត មានប្រជាពិសេស ស្រាស់ និងស្ថិត ស្រាស់ ស្រាស់ ស្រាស់ ស្រាស់ ស្រាស់ ស្រាស់ ស្រាស់ ស្រាស់ or published the state to a track things to take a mint state the state the state to see ರ್ಷ-೧೯೯೮ ಕ್ಷೇತ್ರಗಳ ಬಿಡಿಕ ಗೆರ್ಮಿಸ್ಕರ ಅಂಗ್ರಹಿಸಿದ್ದಾರೆ ಕ್ಷೇತ್ರಗಳ ಕ್ಷೇತ್ರಗಳ ಕ್ಷೇತ್ರಗಳ ಕ್ಷೇತ್ರಗಳು the walk balls for the contract well-distribute to the contract of <mark>⇔្វាស់</mark>ស្នារដ្ឋ និស្សា 1 ក្នុងស្រី កិច្ច ជាប់នៅ ខ្លួន «១ ការសំពា ជាស្រុស **ស្តា ១ «៤៣ ៤៤៥»១៤៤**០ Approximately for a serial contraction of the serial contraction of th steet notes with all que la letter with his fill that leifisted glocots with April 40 At An A 1904s Code to Justice and roll occurred. The discrete The Tripel Consideration of the first wife at the state of the contract of the varius estato inni eratikilies, panto inni guntili sageline gat la greige anne de le compet la latte ser sie mis gar The complete collection of the second color of the firm form to be able to be the collection of the color of grant the transfer of the second control of the con ាននៅ បានក្រុងស្រែក្រុម ក្រុម នេះ នេះ បានប្រជាព្រះ ស្រែក moving that the transfer will be the common modifier of the later of the latery. and though a minute area. The are like a country where have well a maintained also shows Israno le fondumenta mo en en el louset el les libertistes vouseive in it is the ground of the control o The transfer of the control of the c the first the contract of the first terms of the first terms of the first terms. .. virgeant bi Solders on the Auxistance of a living block Chimmisia Dr. No. dland, we will am something teneshing the different or the gry - aren's and the to me wis a to the state of the area y Letae per comb minuits . In these of the boson is while to construct of and ministry days for better the common and many referred at 19,000 ft. to

days of the filing of this opinion, then it is the order of this court that judgment be entered here against defendant for 3,500.00. Otherwise, the cause will be reversed and remanded for a new trial.

IF REMITTITUR OF \$1,500.00 IS MADE WITHIN FIFTEEN DAYS FROM FILING OF THIS OPINION, THEN JUDGMENT IS ENTERED HERE AGAINST DEFENDANT FOR \$3,500.00.

OTHERWISE, CAUSE WILL BE REVERSED AND REMANDED FOR A NEW TRIAL.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

THE REPORT OF THE PROPERTY OF

1

solution of the second of the second

38807

LOUIS D. GOODMAN,

Appellee.

Va

FRED FARKET and N RRY S. PAREER, SR.,
Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

20 7 1. H. VA.

MR. JUSTICE HALL DELIVERED THE OFINION OF THE COURT.

Plaintiff, Louis D. Goodman, brought suit in the Superior Court of Cook County of inst the defendants, Fred Fred Fred and Herry S. Parker, Sr., for certain commissions alleged to be due him as a salesman under an oral contract made with the defendants. The cause was submitted to a jury, which returned a verdict in favor of plaintiff for the sum of 10,668.33, upon which the judgment appelled from was entered. Various questions are raised here, but from a review of the record, we conclude that except as to an alleged accord and satisfaction, suggested by defendants, as noted hereafter, the questions to be considered are wholly questions of fact.

Plaintiff testified to the effect that at the time of his employment by defendants, they were in the business of manufacturing and selling mean signs; that about april, 1933, he met defendant Harry Parker, Srs, at defendant's factory after an associatment had been made with Parker; that after a conversation regarding almintiff's ability as a selesman, Parker stated that he desired the services of plaintiff to writ upon prospective customers, to ascertain what, if any, character or kind of signs such prospective customer might desire, and that then plaintiff should make a sketch of such proposed sign, that Parker would then make an estimate of the factory cost, including defendant's profit, to be determined by parker, and that "on top of his factory cost (and profit) add ten per cent commission, to which I would be entitled", and that if any other salesman of the defendant corporation had been "working on" any prospective customer, such salesman would be entitled to priority of right to the commission

gar offer to at a Dublish

about the same of the transfer of the same of the same

A in it, seed an expectance and a contract of the contract of

exployment by direction to a contact or action of intermine of reployment by direct to a color of a color of residential that are a fine; which is a color of the color of the

earned in case a sale was made, but that in case plaintiff assisted in closing a deal, he would then be entitled to one half of the commission to be paid. Plaintiff further testified that his arrangement with Parker was to the effect that, if orders were mailed to the Flashtric Sign Company, (the title under which the defendants conducted their business) for the plaintiff, the plaintiff would be entitled to his commission, and that he, the plaintiff, started to work under the arrangements as suggested.

From plaintiff's statement of his case here on appeal, and from his testimony, we conclude, that although he testified that he secured business from various persons and corporations, his claim here is based entirely upon commissions claimed to be due him on account of meon signs sold by the defendants to the Joseph Schlitz Brewing Company of Milwaukee, Wisconsin. As to this institution, plaintiff testified, in substance, that in May, 1937, he ascertained that the Schlitz Beverage Company, as it was then called, was in the market for signs; that at defendants! suggestion, he called upon a representative of that company at their office in Chicago, and was there referred to the representative of the company in Wilmaukee; that on May 8th, 1933, he wrote to this Milwaukee representative in the name of the Flashtric Sign Works, the name, as stated, under which defendants operated, enclosing advertising matter; that in reply, a letter addressed to the Flashtrio Sign torks was received, in which it was stated that the Schlitz Company would give this institution an opportunity to figure on signs, and that after the receipt of the letter by Parker, he, Parker, stated to plaintiff that he, plaintiff, should keep after the Schlitz Company, and that Parker would help him on the deal. A letter from the flashtric dign works, signed by Louis D. Goodman, plaintiff, dated July 8th, 1937, and addressed to Mr. Wheeler of the Schlitz Company was offered and received in evidence, in which a request was made that an appointment be made with

erand in order of the control of the

including the contract of the The Cartain and the specific of the control of the control of the face of the control of the con minis ald to the tar in the ender oweir thought larison lethous #6 no mie sal se od temi us lacinal con no rejestione bored ai swoi no court of acon signs to it of the content of the figure to the court of representation of the contract entricket in the control of the cont the stripped and the second control of the second of the second s in a roul o on goulds live time in this at this pay in not neglect one on. In- to be a section of the course of the I'm ? tourn live of greenes bet to aris substance all as barrates arolf all original services which is noticed to be about the statement of the services and the services are serviced to the services and the services are services as the services are services are services as the services are services as the services are services as the services are services are services as the services are services as the services are services are services as the services are services as the services are s ាត់តាន់ទី២ ២៩នៃការ ខ្លួន និង និង ១៩ ១៩ ខ្លួន ២០១៤ ខ្លួននៃ២០០ សុទ្ធនៃ ១៨៤៩២៣ ២៩គឺ <mark>និង ១៩៣៣</mark> 💴 ಕೃತ್ಯಾತರಣ ವರ್ಷ ೧೯೭೭ ಕೃತ್ಯವಾಗುವು ಭಾಷಕೀತಿಗಳು ಕರ್ಮ ಕ್ರಚಕಾಣಕಾಣದ ಕೃತ್ಯವಿ ಅಧಾವುದ ಕಾರ್ಯಾಗಿಕನ್ನಡುವು - Prof. In Ad. Letter of the control of Adams of the control of th morth Estat tine via those yes not triffer one triff but to also THE BE DEPOSE OF THE PROPERTY OF A PROPERTY OF THE PROPERTY OF ្នាក់ និងក្នុង ដីឲ្យ ភ្នុង នា ស៊ីន នៅនិងនៃនៅនៅ ១០ សាកានការសេត្ត គ្នានៅសារ ស្រុក គ្នានេះ ។ ស្មើ **។១៤៥១៤** shoold hoop offer the locality downing, and the to other teach along ngg dia ng ngagan nang ta dharagan naka mata dhara ng tinggan na ng ng tinggan na and transfer of the option of the company of the co -ive all vires in a could a particular to the salsone . The ionos, in which a guest end or belief in a sintense a mir situ

the agent of the Fleshtric Sign works to meet a represent tive of the Schlitz Company in Milraukee, to shich an answer was received from the Schlitz Company, suggesting that a representative of the Flashtric Sign works meet their Chicago representative in Chicago. The record indicates that shortly there for plaintiff did meet and consult with a representative of the Schlitz Brewing Company purchased a quantity of neon signs from the defendant company.

The bookkeeper of the defendants, offered as a witness by plaintiff, testified that "the orders we have received from the Schlitz Brewing Jompany prior to December 14th, 183", for signs total \$75,023.71, and the orders we received for parts prior to December 14th, 1931, total \$108,569.00. I have made a calculation of the total orders that were received by the flashtric Sign Torks from the Schlitz Brewing Jompany up to and including Earch 23rd, 1834, and in addition to those orders I have already given, the orders for signs total \$20,410.00, and the orders for parts total \$36,470.00."

Plaintiff resigned his position with the defendant company in December, 1933. He testified to the effect that at that time, he had a controversy with Mr. Parker about certain claimed and unpaid commissions on the account of the Schlitz Brewing Company, and that Parker said to him, "I have no time. If you want to, I will give you 50.00, the cost of oil or telephone calls and the running around you may have done on this Schlitz proposition"; that farker then gave plaintiff a check for \$50.00, and that the witness said to Parker, "Well, if that's all I am getting, there is no use for me working here any longer." This testimony is not disputed. Plaintiff insists that while he was in the midst of the negotiations with the Schlitz Brewing Company with the purpose of obtaining orders from this institution for signs, the defendant, not acting in good faith, but with the purpose of avoiding the payment of commissions to plaintiff,

in secence of the second secon

and without notice to him, revoked his authority to continue negotiations with the Schlitz Brewing Company, and himself concluded the sale to this institution of large quantities of signs at various times. This is not denied by defendants. Plaintiff insists, that nevertheless, he was the efficient and procuring cause of these sales, and that he was entitled to commissions upon all orders for signs obtained from the Schlitz Brewing Johnany by the defendants, including orders received after plaintiff's resignation, on December 14th, 1933.

Defendants, on their part, take the position that plaintiff was not the efficient procuring cause of the vales, but that the sales were made by defendants in good faith through another salesman named Frisch, acting independently of plaintiff; that Frisch, alone, was the efficient procuring cause of the vales, and was entitled to and paid the commissions thereon, and that, in any event, plaintiff's claim being unliquidated and disputed by them, was satisfied in full by them prior to the commencement of the suit by the receipt and acceptance by plaintiff from defendants of the check for 150.00 in full satisfaction of his claim. There was no receipt or other document made by plaintiff to indicate that this was in full satisfaction of his claim.

Defendants filed a counterclaim, in which they seek to recover from plaintiff commissions alleged to have been overpeid. We find nothing in the record to indicate that they attempted to support this claim.

Defendant, Harry Parker's testimony with regard to his firm's relations with the Schlitz Company, indicates that he made the arrangement with plaintiff with regard thereto, as stated, and that after plaintiff had made a number of salls upon the representative of the Schlitz Srewing Company in Chicago, he, Farker, had a number of conferences with various representatives of that company;

diff and the first of the construction of the

the Line graft distant at post-companies — local rate for the companies of Land and the companies of the companie

A. of Inglined Section of the species of theorem is given a control.
 A. of Inglined Community of the species of the Section of the

that shortly after plaintiff entered his employ ant with defendints. and at a meeting between the defendants and v rious salesmen employed by the defendants, held in May or June, 1933, concerning disputes between these s lesmen as to which should receive commissions in a case where a number of them had been working on what is referred to as a "prospect", meaning a person or institution to whom or which they were expecting or endeavoring to sell signs, and that the result of these conferences was that the salesmen were directed by Parker to keep the defendants informed as to which of their salesmen were seeking to sell signs to the same customer, and that it was then agreed among the salesmen and Forker that Forker should assign to the work of closing the deal to the selesman whom he determined should be entitled to the commission after the deal was closed, and that it was further agreed among the salesmen, including plaintiff, and acquiesced in by Parker, that in the event that two or more salesmen were working on the same deal, that the commissions should be divided equally between them. Plaintiff's testimony indicates that Parker's version of this agreement between defendants and the salesmen, is correct.

Another method adopted by defendants, and agreed to by
the salesmen, was to cause a box to be placed in defendants' office,
in which the various salesmen deposited a notice or memorandum of
their so-called "prospects", for the purpose of determining just
which of such agents might have a prior claim to commissions in case
several agents called on the same "prospect". It is in evidence, and
not disputed, that the plaintiff's card, containing a notation,
indicating his effort toward making sales to the Schlitz Brewing
Company, was the first of a number of cards deposited by the salesmen,
indicating their efforts in the same direction, and that plaintiff's
card remained in such box until his relations with the defendants were

ᢏ tar us. Jako II 🦿 I om til bli i ladelikk i stologistmins dost Contract to the first of the fi ្រុកស្រុស ប្រជាពលរបស់ សម្រេច ប្រធានក្រុម សម្រេច ប្រជាពលរបស់ ស្គ្រាស់ ស្គ្រាស់ ស្គ្រាស់ ប្រជាពលរបស់ ស្គ្រាស់ ស្ all the south and this term and the first term and the employees through sometimes in liker in the first of the same for the state of the st ejak na mr. – a po jak nje v rok me krije na činajskog svoje a pr with  $x \in \mathbb{R}$  ,  $x \in \mathbb{R}$  . The  $x \in \mathbb{R}$  is the  $x \in \mathbb{R}$  and  $x \in \mathbb{R}$ ing skulpting in the control of the first of the control instructions and the Vilgeon 🕶 af a civil 1999 til 1990 kill skrival sammarind och men ut som st The state of the second of the naire and the first was his new and standards not Trule code for week at a factor of his Control of a feater to dury of of br: paragio no des el su distributado no ser un indicione se rigione and the state of the control of the state of -agir, whom you or victed on yet the middell property yellow lace took the ad though anti-the or it is the term about the action of the admitted are de protections que ser a el estada de la contra el galembo debivit -cells but for his instance of the contract of the solution of men, is correct.

the makes as, as a constant of the street and the street as a constant of the street as the makes as, as a constant of the street and the street as the street as a constant as the street and the street as a constant as the street and the street as a constant as the street and the street as a constant as a constant and the street and the street as a constant as a constant and the street and the street and the street as a constant as a constant as a constant and the street as a constant as

severed. During practically all the time that plaintiff was associated with the defendants, the evidence indicates, he was engaged in an effort to sell signs to the Schlitz Company, and that after plaintiff (to use a phrase of plaintiff's counsel in their brief) "had contacted" the Schlitz Browing Company, an agent of defendant's named Frisch was engaged in the same work, and that he, Frisch, "contacted" the general purchasing agent of the Schlitz Browing Company. The record shows that several other salesmen of defendant's "contacted" the Schlitz Browing Company, and there is a great contracted the Schlitz Browing Company, and there is a great contracted with this corporation. The are not informed as to whether or not plaintiff was ever paid any commissions on account of the signs sold to the Schlitz Browing Company. We therefore, includes in the presumption that he was not.

that in October, 1933, he made a trip to Milwaukes with Marry Parker, one of the defendants, and interviewed the general manager of the Schlitz Brewing Company. Stone was a manufacturer of sheet and metal products used in advertising signs, and the record indicates that he had done a great deal of work for the defendants. Stone testified that on this trip, Parker told him that "one of his (Parker's) salesmen, a Mr. Goodman, had 'contacted' the Schlitz Brewing Company, and that he (Parker) was going to take care of him in some manner", and that "The commission (to which Parker referred) was a commission on signs sold to the Schlitz Brewing Company by a salesman who was responsible for them getting the order". Parker does not deny that he made this statement.

Frish, the defendant's selemen to whom the record indicates the commissions on the Schlitz Brewing Company's sales were paid, testified, in effect, that about Cotober, 1933, he "contacted" the general purchasing agent of the Schlitz Brewing Company and percent. The first percent was also also also also also been considered and the considerations of the construction. The consideration of the construction of the const

A minument of the state of the state is the state of the

The party of the cast medical termination of the cast party and the cast party and the cast party of t

induced him to come to Chicago; that he talked to bim almost every day, and had considerable correspondence with the soblitz Brewing Company. In connection with this witness's testimony, there was offered in evidence various statements by the defendants' institution, the Flashtric Sign works, showing a large amount of commissions paid to the witness. His testimony indicates that it was long after the plaintiff "contacted" the Schlitz Brewing Company, that this witness was put on the job.

A number of witnesses were produced on each side, and the record is warmy confusing as to just which of several persons, including plaintiff, secured the Schlitz business. The jury saw and heerd these witnesses, and we are of the opinion that upon the question alone as to whether or not plaintiff had or had not errned the to which we have referred, commissions claimed, the evidence is sufficient to justify the jury's verdict. The further question to be determined, nowever, is whether or not the payment of the 50.00 to the Maintiff amounted to an accord and satisfaction. On this question, defendants contend that where a claim is unliquid ted and that there is a bonn fide dispute as to the sum actually due, or a bons fide doubt or controversy as to whether anything is due, then an accord and satisfaction may be established, and the adequacy or inadequacy of the payment is immaterial and will not be inquired into, and among other cases, cite that of Kall v. The W. G. Block Co., S19 III. 339, where the Supreme Court of this state says that "where there is a bona fide dispute between a debtor and creditor as to how much is due, a payment of the amount claimed by the debtor in full settlement, if accepted by the creditor, is a satisfaction of the claim." From the record in this case, we must conclude that plaintiff had no method of ascertaining what amount, if any, was due and payable to him on account of these commissions, except from defendant's records. the undisputed testimony as to what defendant Farker said to plain-

<u>ಯಾಲಕರ್ಗಳು ಅಗಳ ಮುಂದರ ಸರ್ಕಾರ ಅತ್ಯಂತ ಕಾರ್ಯಕ್ರಮ ಸಂಕರ್ಣ ಕ್ರಾಮಕರ್ಮಗಳಲ್ಲಿ ಅತ್ಯಾತಿಕೆ ಅಲ್ಲಾಗೆ</u> lions or to saidber that I had I are our more except that no obtained that no which no have reflered. workloss, the first was final and the actual actual as the first results of wiff in Alab our Finish a confirm to him a moder inline for buscos atografic <u>action pad</u> more result of the control of the discount within a commen or the weather is been taken there is a continue to be a second of so ad yes entire that our other in the control of the second of a district which second THE YOUR TO NOT BUT WITH THE TO THE WAY HE THAT FOR THE LONG TO THE Land toring and risks out the Lewisher' Cabo, and room at economic MAN which has not described which and a particular transfer who we want to ⇔γγγ α , the classes are all be cultibeed by collable save who save all The state of the state of the terminal party of the state កក្តី អ្នកម្នា "ស្រានិស្ស សក្ស និង ១ និងសាស្ត្រីសេដ្ឋាយ ស នេដី ភ្នាក់សារីយ៍ កម្ពុជា ស្រានី សូវ ស្រានិយនិយនិយនិ igo Appliko igo organizacia in Angis obci. Ondo organizaci igo a comincia di Sapost macordaniamic of the party of the party of the contract of the contract of

ecocunt of the economic four part transport of the economic terms of the economic medical economic and the economic medical economic econo

tiff when he demanded an accounting for commissions claimed on the Schlitz Brewing Company orders, we gather that Parker indicates to plaintiff that he would pay him no such commissions, but that he would pay him for any expense that plaintiff might have incurred in accuring, or attempting to secure, the business of the Schlitz Brewing Company. It, therefore, cannot be said that the check given to and accepted by plaintiff was an accord and satisfaction of plaintiff's claim for commissions. By this testimony, it is shown that it had no relation whatever to the matter of any claimed commissions, but was only for certain expenses incurred by plaintiff. The many cases cited by defendant are not in point. This defense is without merit, and the judgment of the Superior Court is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

A PART TO A CONTRACT OF THE CONTRACT OF THE ACTION OF THE

and the second of the second of the second of the

38824

BRAINERD AUTO SALES, INC., a corporation,

Appellant,

V.

STUDEBAKER SALES COMPANY OF CHICAGO, a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

289 I.A. 615

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago entered in an action of replevin, brought by plaintiff against defendent to recover possession of a besoto seden automobile. The trial court found for defendant.

Plaintiff claims title to the car by reason of the assignment to it by Faul A. Brown, of Brown's certificate of title thereto.

Brown, a witness for plaintiff, testified, in substance, that on September 10th, 1935, he visited plaintiff's place of business, and there talked with a salesman mamed hurray about purchasing a new Dodge automobile from plaintiff, and that while in plaintiff's place of business, he signed an order for the car, which as introduced by plaintiff was offered and received in evidence. This document/indicates that Brown authorized plaintiff to enter his order for : Dodge Coups at a price of 776.69, which included certain accessories, among which is noted safety glass, at a price of [7.80, Also, there is a recitation in this document to the effect that Brown agreed that the Dodge car was to be purchased by him subject to the manufacturer's warranty, and that the price quoted was for immediate delivery, that the order was not to be binding until authorized by an officer of the Brainerd Company, and the credit O.K'd, by a finance corpor tion. Brown also testified that when he signed the order, the price fixed thereon was .768.86, but that after the order was delivered to Murray, the salesman for plaintiff, and without Brown's knowledge or consent, Murray added to the amount originally agreed to be paid,

10000

4 3 M July 18 July 18

at the second of the second of

**考**套针,AL 9~5

an milineipumme tid ive imegramie ir well tree in valetae.
District que montage (sives et a seite en al her intropriet to
Financime et es onos et ince danne au proposa et in sociat duning en au
en au et inschier dun i internite

The firm of the second of the

To some of the limit of the property of the control of the control

therwood was 1930-30, but the first of a state of district as the remaining the extrement of the control of the

the similars soupley, as the smooth wills, by a stained on the son, we warm what west in the state of the sta

the sum of .. 7.80 as the price for shatter proof glass, asking a total price of .776.69; that after the order was signed and Brown's certificate of title to the DeSoto car had been assigned to plaintiff and delivered to Murray, he again saw Wurray of plaintiff's place of business, and that Murray told the witness that plaintiff had a cor for him which he exhibited to plaintiff, and for which car an extra charge had been made for the snatter proof glass, and that Brown then told Murray ne would not pay the extra amount, the the then requested the return of his certificate of title from Murray. and that Murray then told him that this certificate had been sent to Springfield. Brown further testified that thereupon he declined to purchase the Dodge car, and that Murray told him that the DeSoto car belonged to the plaintiff; that he, Brown, then made application to the Secretary of State for a duplicate certificate of title, which he subsequently received, and that thereafter he traded the De Soto car to the Studebaker Bales Corporation, the defendant here, as a part payment for a Studebaker car, and that he delivered the DeSoto car, the subject of this suit, to the Studebaker people on or about September 27th, 1935. Brown further testified to the effect that Murray told him that the order signed by him was just " sales slip form, and that Murray stated to Brown that the reason he wanted Brown's certificate of title assigned to plaintiff, was because he, Murray, wanted something "to work on"; that it was agreed that Brown should retain possession of the car; that the car had been in his possession during all the time and until he delivered it to the Studebaker company, and that plaintiff never demanded possession off the DeSoto car from him.

Murray testified that he was the sales manager of the plaintiff company; that he exhibited the Dodge car to Brown, that Brown signed the order for the purchase of the car and delivered his certificate of title to the Desoto car owned by Brown, to the witness

one dit to grade the control of the atomics of the second of the s This was a superior of the sup to the transfer of the second of the second of the form ាងស្រាស្ត្រី ប្រាស់ ស្រាស់ សម្ពេច សម្ពេច ស្រាស់ no the Roll of the profession of the interest of all the content with the great war. to the product of the second form the grown black and and <mark>เป็น</mark>กระที่สามารถสามารถสามารถสามารถสามารถสามารถสามารถสามารถสามารถสามารถสามารถสามารถสามารถสามารถสามารถสามารถสามาร or decrease, which is a proceduration of the contract of the c ត្តសម្បីប្រជាពលរដ្ឋ នេះ បានប្រជាពលរដ្ឋ ប្រជាពលរដ្ឋ ប្រជាពលរដ្ឋ នេះ បានប្រជាពលរដ្ឋ បានប្រជាពលរដ្ឋ ប្រជាពលរដ្ឋ ប - the fixe in the control of the c posts as a communa of the community of the proposition of the community of 「大変が変ました」というできたが、サインでは、いまたでは、これでは、コインは、コインは、関係性能は関係など、特殊等のは、 The state of the s \* こと Manager Transport (Transport Transport Transpo one were the control of the control Delication of the experience of the second policy of the experience of the second of 574 - 5 - 12 In the second of a control without goal in the second about the <mark>ាត្</mark>ត្រាស់ មាន ភាព ស្រែក **រាជា** មិន atories of a file 2 in the second of the second became I to a first the second of the face of the total and confident for the second s grant to the control of the control ar di comminer de dicento e de la certa la colore en imposes ein di Authorator, Pairs, for the Arabany for the Last entering the Arabana experience and which is a transfer of the contract of the con

elt iv, gengene i len som en ett frållidset gengsst dom foggene om ener i jest held årdådlider fri domå fygme, som i låådmånåd el fogensishe. Det en moset, han oliketset som tolk some eda fostig semsstä essektim bel od for syn ener oliket som mår okklust. Til de skållidtset on September 10th, 1935; that Brown afterwards came to the witness and told him he had decided he could not afford to buy the Dodge car; that neither the witness nor plaintiff ever had possession of the DeSoto car, and that the Dodge car which the plaintiff had agreed to sell to Brown, was afterwards resold by the plaintiff commany.

It is in evidence, as stated, that after Brown declined to buy the car from plaintiff, that the Dodge car was sold by plaintiff, and there is nothing in the record to show how much plaintiff received for it. From all that appears in the record, it may have been for its full value. As before stated, the order signed by Brown provides that it shall not be effective, and that the sale of the Dodge car would not be completed, until the sale was authorized by an officer of the plaintiff company, and the credit O.K'd. by a finance company. On the document received in evidence, among other things, is the following: "Authorized by L. L. Freeton". | witness named Ernest Preston testified for plaintiff to the effect that he was an automobile dealer; that the Dodge coupe mentioned in the order was sold by the plaintiff, and that he did not know the price at which it was sold, nor to whom it was sold. It certainly cannot be said that this testimony identifies the person who signed the authorization of the order as an officer of the plaintiff company.

In The Estate Stove Jo. v. Kenney, et al., 234 Ill. App.
366, an action was brought in the circuit court of Iroquois Jounty
to mecover the price of stoves alleged to have been sold by the
Estate Stove Company to 4. 2. Renney and Oscar 2. Danielson. The
judgment there was for the appellees. The order for these stoves
given by the defendant in that case, contains an agreement to the
effect that "All agreements contained in this order " " are subject
to approval by a duly authorized executive officer of the company."
The order was not approved by an executive officer of the company.
The goods were shipped, and upon arrival, the defendants refused to

- provide a contract of a contract of and a contract position of the second provided and second provided and a contract of a

miles and seed and the control of th

In the later of the control of the c

receive them, and in that case, the court made the following holding:

"then appelless delivered the written order to the traveling salesmen of oppellant, that order was not a contract between the parties. It was merely an offer by appellers to purchase the stoves. Before it become a contract it had to be accepted by a duly authorized executive officer of appellant. State Milling Co. v. Borth, 135 Ill. App. 539; Bent v. Jones, 173 Ill. App. 62. If a duly authorized executive officer of appellant did not see fit to accept the order, then it did not ripen into a contract and appellant was under no obligation to deliver the goods. L. C. Atkins & Co. v. Kirk, 187 Ill. App. 311. Where an offer is silent as to the time within which it is to be accepted, it must be accepted within a reasonable time after the offer is asde. Larmon v. Jordan, 58 Ill. 204; Koeffler v. Davidson, 68 Ill. App. 542; Allen B. Trisley Co. v. Mathieson Alkali orks, 107 Ill. App. 379; Benjamin on Sales (3rd Ld.) p. 61. If an offer is not accepted within reasonable time the person making the offer has the right to presume that it is rejected. McGivern v. Porkhill, 195 Ill. App. 344. There is no evidence that this order was ever approved by a duly authorized executive officer of appellant. There is some evidence tending to show that it was approved by D. F. Kahn, but there is no evidence that he was a duly authorized executive officer of amellant. The avidence shows that the supposed approval was made by drawing a line across the order indicating that it had been accepted by appellant, but there is no evidence even tending to show who drew the line across the order, or when it was drawn."

Murray does not deny the statement of Brown that the price of \$768.86 to be paid for the Dodge car was energed by Eurray, and the price increased to \$776.69, after the order was signed, and that when Brown's attention was called to this fact he declined to accept the car at the increased price. Plaintiff's right to recover is based entirely upon the theory that there was an offer by Brown and an acceptance by plaintiff, and that the assignment of the certificate of ownership of the DeScto, conveyed title to the car to the plaintiff.

In El Reno Grocery Co. v. Stocking, 293 Ill. 494, the grocery company brought suit against the defendant to recover damages for an alleged breach by defendant of a contract for the purchase of certain canned corn. The action in that case was based upon a written offer made by the defendant to purchase the corn and an acceptance by the plaintiff. The offer provided that the shipment

ន្ទាន់ស្តីនៃស្ត្រា ខ្លាស់ ស្ត្រា ស្រុក ស្រុក ស្រុក ស្រុក ស្រុក្សិត ស្ត្រិក ស្រុកនៅន និងស្ថិននេះ

The state of the s

The property of the control of the c

 should be made by a certain date. The date of shipment was changed by plaintiff, and in holding, that because of that fact, the plaintiff could not recover, the Supreme Court said:

"In order to have the acceptance of an offer binding such acceptance must conform exactly to the offer, and if it contains new conditions there is no contract. Scott v. Fowler, 227 Ill. 104; Davis v. Fidelity Fire Ins. Go., 208 id. 375." (Italies ours)

In view of all the ficts and circumstances in this case, we conclude that the assignment of the certificate of title to the plaintiff here by drown conveyed no title, in the pesoto car, to the plaintiff. It was made without any consideration, whatever. Therefore, the judgment of the Municipal Court is affirmed.

APPIRED.

DENIS E. SULLIVAN, P.J. AND HEREL, J. CONCUR.

should be successful to a constitue of the second development developmen

អាចមាន ប្រជាជាក្នុង មិន ស្គ្រាប់ ប្រជាជាក្នុង បានប្រជាជាក្នុង ស្គ្រាប់ មុខប្បីប្រជាជាក្រុម ប្រជាជាធិបតេ ស្គ្រា ប្រជាជាក្រុម ខេត្ត ស្គ្រាប់ មុខប្រជាជាក្នុង ស្គ្រាប់ ស្គ្រាប់ ស្គ្រាប់ ស្គ្រាប់ ស្គ្រាប់ ស្គ្រាប់ ស្គ្រាប់ ប្រ ស្គ្រាប់ ប្រែក្រុម ស្គ្រាប់ ស្គ្រាប់ ស្គ្រាប់ ស្គ្រាប់ ស្គ្គាប់ ស្គ្រាប់ ស្គ្

An including the contraction was expensed as a fill to return as
 And affiliate and allocation result, and in the contract was approximated by
 And affiliate the contract of the contraction of the contraction of the contraction of the contraction.

while the following the first of the while with

HEDWIG KRISTENSEN,

(Plaintiff) Appellee,

V.

ANTONI BALCZENIUK, et al.,

On Appeal of ANTONI BALCZENIUK, and RACHELA BALCZENIUK, his wife,

(Defendants) Appellants.

APPEAL FROM

99

CIRCUIT COURT

COOK COUNTY.

2.9.A.015

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of sale entered in a foreclosure proceeding, brought by Hedwig Kristensen, in the Circuit Court of Cook County on January 17th, 1936. The decree wascentered on the report of a Master, to which no objections or exceptions were taken. After certain formal findings as to the appearances of the parties, the decree appealed from, which recites all the material facts as found by the court, proceeds substantially as follows:

"And this cause having been brought on to be heard upon the Amended Complaint taken as confessed by antoni deleveniuk and Rachela deleveniuk, his wife, and John T. Murray, Successor in Trust. And on the answers of the defendants, August solter and A. Lapinski, and upon the plaintiff's replications to said answers, and upon the proofs and exhibits herein, and the Report of Denjamin -. damowski, a Master in Chancery of this Court, made in aursuance of an order of reference heretofore entered herein, and it appearing that all the parties are properly before the Court, and that the Court has jurisdiction of the subject matter, and of the parties hereto, it is ordered and adjudged by the Court that and report be and the same is hereby approved and confirmed, no objections or exceptions having been filed thereto."

The master found, as stated by the court in its decree:

"That on August 25, 1923, Theodor Kollner and Henrietta Kollner, his wife, were indebted in the sum of 8,500. That in order to evidence their said indebtedness and to secure the payment thereof the said Theodor Kollner and Henrietta Kollner, made, executed and delivered their three principal promissory notes, designated 'A', 'B', and 'C', Note 'A' for \$1,000.00, Note 'B' for 1,500.00, and Note 'O' for \$6,000.00, all said notes payable to the order of themselves, bearing date, August 25, 1923, payable five years after date, with interest at 6p per annum, payable semi-annually, which said interest was evidenced by interest notes or coupons attached to each of said principal notes, ten for \$30.00 each, 10 for \$45.00 each, and 10 for \$180.00 each. All said notes were

The second secon

and the control of th

Some approximation of the series of the series of the control of t

the final transmit of the control of

100 પાકરિયા દેખાણો, કરા કરાવારો સ્ત્રિક કરાવાર દેશ હૈરા તેવા કરા

Asking the sale of the provent of the control of th

secured to be paid by a Trust Deed that was recorded in the Office of the Recorder of Deeds of Cook County, Illinois, as Doc. #8109493. That when said principal notes became due August 25, 1928, payment thereof was extended by agreement of the owners of the real estate described in said Trust Deed and the owners of said notes, and by subsequent extension agreements each of said principal notes was extended to become due and ayable August 25, 1336. That the defendants, August Molter and A. Lapinski, have filed their answers herein submitting to the jurisdiction of this court and asking that the Notes 'A' and 'B' owned by them respectively, be foreclosed herein and that the amount due on said notes to said defendants be ascertained by the court in this proceeding. That all interest notes pertaining to Notes 'A', 'B' and 'C' that became due and payable prior to February 25, 1934, were paid when due, were so marked and delivered up. That the interest due and mayable on each of said Notes [A], [B] and [C] on February 25, 1934, was not paid and said interest notes and all subsequent interest notes pertaining to said notes 'A', 'B' and 'C' remain unpaid and in the hands and possession of the plaintiff as to those interest notes pertaining to Note 'C', in the hands of August Molter those pertaining to Note 'A', and in the hands of A. Lapinski those pertaining to Note 'B'.

"That the plaintiff, Hedwig Kristensen, and the defendants, August Molter and ". Lapinski, have and are entitled to equal and coordinate liens on the real estate described in the Amended Complaint by virtue of the lien of the Trust Deed foreclosed herein which was recorded in the Office of the Recorder of Deeds of Cook County, Illinois, as Doo.

#8109493

"And the court being fully advised in the premises, doth find that all the material allegations in said Amended Complaint are true and are proved. That there is due to the plaintiff, Hedwig Kristensen, as the owner of Note 'O', the sum of 6,930.74, and interest thereon at the lawful rate from the 3rd day of January, 1936, the date of said Master's Report. Also the sum of \$700.00, also found due by said report as a reasonable attorney's fee, and the further sum of 11.00 for a reasonable stenographic fee under the provisions of the instruments sued on.

"That there is due the defendant, August Molter, as the owner of Note 'A', the sum of 1,155.13, principal and interest, with interest thereon at the lawful rate from January 3rd,

1936.

"That there is due the defendant, A. Lapinski, as the owner of Note 'B', the sum of \$1,732.70, principal and interest, with interest thereon at the lawful rate from January 3rd, 1936."

Based upon the Master's report, the decree then proceeds

## as follows:

"It is, therefore, ordered, adjudged and decreed that if the defendants, Antoni Balczeniuk and dechela Balczeniuk, his wife, or some of the defendants, do not pay within three days from this date, to the plaintiff, Medwig Kristensen, as the owner of Note '6', the sum of 6,930.74, with interest thereon at the lawful rate from January 3rd, 1936, until paid, and the costs of this suit, (including the said attorney's fees, stenographer's fees, and the Master's fees on the reference

The control of the co

'and is a order prince of the collision in the case are included with the collision of the collision of the collision of the case of the c

್ರಿಯಾ ಸ್ವರ್ಣಕ್ಕೆ ಕ್ಷಾಣಕ್ಕೆ ಸ್ವರ್ಣಕ್ಕೆ ಸ್ವರ್ಣಕ್ಕೆ ಪ್ರಸ್ತಿಗಳು ಪ್ರತಿಗಳಿಸುವು ಸಂಪರ್ಣಕ್ಕೆ ಸ್ವರ್ಣಕ್ಕೆ ಸ್ಟರಿಸಿ ಸ್ವರರ್ಣಕ್ಕೆ ಸ್ವರರ್ಣಕ್ಕೆ ಸ್ಟರಿಸಿ ಸ್ವರರ್ಣಕ್ಕೆ ಸ್ವರರ್ಣಕ್ಕೆ ಸ್ಟರಿಸಿ ಸ್ಟರಿಸಿ ಸ್ಟರಿಸಿ ಸ್ಟರಿಸಿ ಸ್ಟರಿಸಿ ಸ್ಟರಿಸಿ ಸ್ಟರ್ಣಕ್ಕೆ ಸ್ಟರಿಸಿ ಸ್ಟಿಸಿ ಸ್ಟರಿಸಿ ಸ್ಟರಿಸಿ ಸ್ಟರಿಸಿ ಸ್ಟರಿಸಿ ಸ್ಟರಿಸಿ ಸ್ಟರಿಸಿ ಸಿಸ್ಟಿ ಸ್ಟರಿಸಿ ಸ್ಟರಿಸಿ ಸ್ಟರಿಸಿ ಸ್ಟರಿಸಿ ಸ್ಟರಿಸಿ ಸಿಸ್ಟಿಸಿ ಸ್ಟರಿಸಿ ಸ್ಟರಿಸಿ ಸಿಸಿ ಸಿಸಿ ಸಿಸ್ಟಿ ಸಿಸ್ಟಿಸಿ ಸಿಸ್ಟಿ ಸಿಸ್ಟಿಸಿ ಸ್ಟರಿಸಿ ಸ್ಟರಿಸಿ ಸ್ಟರಿಸಿ ಸ

Beauty of the cateria velocity the care that medands

## es dellet se

1

is ner insection; it properties to the confinence of the confinenc

herein, which are hereby taxed at the sum of \$101.65, and to the defendant August Molter, as the owner of Note 'A', the sum of \$1,155.13, principal and interest, with interest thereon at the lawful rate from January 3rd, 1936, and to the defendant A. Lapinski, as the owner of Note 'B', the sum of 1,732.70, principal and interest, with interest thereon at the lawful rate from January 3rd, 1936, the premises described in said Amended Complaint and the Mester's Report, [description of the real estate involved] situated in the City of Chicago, County of Cook and State of Illinois, (together with all buildings and improvements thereon, and tenements, hereditaments and appurtenances thereto belonging), or so much thereof as may be sufficient to realize the amount due the plaintiff, Hedwig Kristensen, principal and interest and also the costs of this suit, including attorney's fees and other fees as foresaid, disbursements and commissions, and the defendants, August Molter and A. Lapinski, principal and interest, and which may be sold separately without material injury to the Darties interested, be sold at public auction, for cash, to the highest and best bidder, at the judicial salesrooms of the Board of Appeals, Room 337 County Building, in the City of Chicago, Lounty of Cook and State of Illinois. [Then follows the order for publication of notice of the sale]

"Out of the proceeds of sale he shall retain his fees, disbursements and commissions, and see that all unpaid costs are paid to the persons entitled to receive the same. He shall then pay to the plaintiff, Hedwig Kristensen, and the defendants, august Molter and A. Lapinski, or to their respective attorneys of record, the amount due them respectively under this decree, with interest as aforestid, and all taxable costs advanced by said parties, if the remainder of proceeds be sufficient; if not sufficient, he shall apply such remainder in satisfaction of said amounts due, as far as it will reach, paying to each of said parties her or his proportionate share of such remainder, and report the deficiency remaining unpaid to each. If there be no surplus he shall

bring it into court to abide an further order herein.

"It is further decreed herein that in case of a deficiency of proceeds from said sale the Receiver heretofore produced herein shall continue as Receiver until the further order of this court.

"After the coming in and confirmation of the Master's Report of sale, in case any deficiency is shown in the amount due the plaintiff and the defendants, August holter and A. Lapinski, they shall be entitled to execution against the defendants, Antoni Balczeniuk and Machela calczeniuk, his wife, who are personally liable therefor." (Then follows a recitation to the effect that if the property being foreclosed is not redeemed, a deed shall issue.)

It is not claimed by defendants but that, by the terms of the trust deed and the extension agreement, defendants are in default on all the notes, and that the owners of the notes, therefore, have the right to foreclose. Defendants! contention is that the plaintiff in the bill of complaint is without authority to accelerate the

The contract of the contract o

. mistra i trist at the trist of the state of the print of the print of the print of the state o

please the continuity of an alient continuity of the form of the f

if in more than the construction leaves that the construction of t

majority of the entire mortgo e indeptedness upon default in the payment of the interest of the note held by her, and to foreclose such entire amount when other notes secured by the trust deed are owned by other persons, not complainants in the original bill. From the report of the Master and the decree of the court, it appears very clearly that the owners of the three notes for which the property sought to be foreclosed was aledged as security, by various pleadings, became parties to the foreclosure suit. . e are of the opinion that that proceeding adopted by the court was in strict conformity with Sections 151, 152 and 153 of Chapter 110, Illinois State Bar Stats. 1935, which provide that all proper parties, plaintiff and defendant, may be brought into a proceeding. As a result of the procedure in this case, the entire subject matter was properly before, and all the parties were, within the jurisdiction of the court. The report of the Master finds as does the decree of the court, that the defendants were in default. In view of the fact that no objections or exceptions were taken to the Waster's Leport, we must proceed upon the theory that such report is conclusive of all questions covered by it.

In Cheltenham Improvement Co. v. shitchesd, 138 Ill. 379, the Supreme Court said:

"The cause was referred to the master in chancery to take the proofs and report to the court. The evidence was taken and a report filed, but no exception was taken to the report of the master in regard to tax liens and bayment of tax liens, either before the master or in the circuit court. If, in the opinion of the plaintiff in error, the evidence offered before the master was incompetent or insufficient to establish the claim he was required to file exceptions before the master, and, if overruled there, renew the exceptions in the circuit court. Had this course been pursued, the objection now relied upon might properly be considered; but as no exception was taken before the master, or in the circuit court, plaintiff in error is precluded from making the objection here. The master's report must be held conclusive of all questions covered by it not excepted to. rennell v. Lamer Ins. Co., 73 Ill. 303."

We are of the opinion that the contentions of the defenddants are without merit, and the decree of the Circuit Court is, therefore, affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

## TO ALL DIVERSE OF A DESIGNAL ASSESSMENT OF

: Li : Vonce Contoni enti

"Also ontes a priesti in as arbit in controlly to the court, in evidence and taken on the court, in evidence and taken on the court, in a rick of the court this are a rick of the court of

Se une of the colution they are neutralum of the decimiconte are vithous marity but the deer of the directs count intherefore, officmed.

ANNA SCHNEIDER.

Appellee,

SAMUEL MEYER and JULIA MEYER,

Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered judgment against defendants in the Circuit Court of Cook County for the sum of 8,580,00. The action is based upon a principal and a series of interest notes executed by the defendants, and payable to plaintiff, "ll of which, the pleadings admit, were past due and unsaid. The notes were secured by a mortgage on real estate.

In the answer filed by defendants, it is alleged that on March 5th, 1935, plaintiff agreed with the defendants that the real estate mentioned should be sold for the pest price obtainable, and that the proceeds of any such sale should be given to plaintiff for and in complete payment and satisfaction of the notes sued on, and further, that in the event said property could not be sold, that defendants would convey to plaintiff, or to any grantee she might direct. all their right, title and interest in and to the property described, and that in consideration for such conveyance, plaintiff agreed to cancel, satisfy and extinguish the notes sued upon; that immediately after such agreement was entered into, plaintiff and defendants, at plaintiff's request, proceeded to and did list the property for sale, but that plaintiff and defendants were unable to secure a satisfactory purchaser; that defendants offered, and still are ready, able and willing to carry out the foresaid agreement, and have always been ready, able and willing, in accordance with the agreement, to convey the real estate by deed to plaintiff, or to any grantee that plaintiff might direct, in full and complete satisfaction of the notes sued upon, but that plaintiff, in violation of her agreement, has failed and refused to direct the defendants to

, Y - 1.4 9 1 1

.int to the distriction as a state of the 4 or

distributed control of the control o

in the samen filed by ingresses, in it is single to take inter and state remains and a second of the state of the state of the second of the se are joid abete, reint agra la colina a re Educala Avanidada Sintas zo? Writ. Info to certic to bloom but a computer. In phenone and bods and in complete ony and the Minimorian of the train that and on, the to de l'ille a la descriptione maint est là le disson des substitut sons la la description de la company de la com tania din sasaan jo ay ay a lishici of ey con bino sadanta da direct, all their right, title out index to the to the transfer out with desaribed, and that acquiseration for and conversion, thair និន្ទាក់ទី២០ មានប្រទេស នេះជាមាន មានជាមានជាជាមាន មិនការធ្វើពេះជាតិ ។ «ដើម្បានមេខ **១៤ និ១១៥**ប្រ fine l'hidri L. , ami bresono o campo pres pese redir ¿latribermi All fold his one of libracors (home, or all district to entending to ud aldiner min general it har blide Libra hid bud gelee wer werden second a statement which and to be the first the first of the second of the contract of the co to a redy, while that the term years the tiones in mer area. this commission in political and expense area eyer is even but or illierici os besi po estable lees ada yaw. 10 da jalamaanga ada ataloner ta list at jacath dagha bitathio dost seterary was of entisfection of the not a sund mean, but the defailed, in virt tien at service ab set lestil as beened but baile, and themsengs ted to

execute a deed, or accept the deed in accordance with said agreement, and refused to cancel, surrender and void the notes sued upon in violation of her agreement. In Conclusion, defendants state that, because of such agreement, they are not indebted to the plaintiff. Upon motion of plaintiff, the answer was stricken, and the judgment hereinbefore mentioned, was entered.

As near as we can determine from the statement of the case, which is extremely vague, defendants' position is that the facts set forth in the answer amounted to an accord and actisfaction. We call attention to the fact that there is no statement in this answer, to the effect that a deed to the property was ever tendered to the plaintiff. Even though all the matters set forth in the answer are true still the agreement by plaintiff to do the things alleved, does not amount to an accord and satisfaction.

"This is the case, then, of a promise without execution; and without an express agreement that the promise itself should be a satisfaction; in such case there is no satisfaction of the original debt. The distinction seems to be, that if the promise be received in satisfaction, it is a good satisfaction; but if the performance, not the promise, is intended to operate in satisfaction, there shall be no satisfaction without performance. Sumber v. ane, Smith's Lead. Cas. 146. A mere agreement, unexecuted, to accept a smaller sum in discharge of a larger, is not valid, and the giving of a negotiable promissory note of the debtor, for the smaller sum, on account of, and not in satisfaction of the prior debt, will make no difference. Id. 259, top paging, and see cases there cited.

In Simmons v. Clark, 56 Ill. 96, the Supreme Court swid:

Where an accord is relied on, it must be executed; readiness to perform is not sufficient, nor is part performance sufficient; an accord is always to be entirely executed and not executory in any part. 2 Farsons on Jont. 193; Mussell v. Lytle, 6 Wend. 390; Hawley v. Foote, 19 id. 516.

We are of the opinion that the defense set up by the answer is without merit, and that the court properly entered the order striking the answer and in entering judgment. The judgment is affirmed,

AFFIRMED.

eduncing the state of the state

the set I see a set and the set and set and a set as a set and a set as a set and a set a set

: 1 m draw - Belon of A m g.C . 1 k do <u>ear A . M Edical de</u>
prozectana devide - Ellon - . Ao guard go en lear al adito 
Eleari apimon - Add d do que a angua belon de la manadir hara
maintfulcare en a h m add na de norma el gualda (anida el adito)

Takenal notable. So it is a constant to the constant to the constant of the co

The golden is leaves of the fall selection of the end as the selection of the selection of

of the eligible of a state that private in case while the state of the partitions of the state o

<sup>1</sup> 

ARAM KASPAR,

(Plaintiff) Appellant,

v.

ABSALOM ESHOO, also known as ABSALOM ESHOO DANIEL,

(Defendant) Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

409 I.A. 6161

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On February 37th, 1935, judgment for 3,398,50 was entered by confession in the Municipal Court of Chicago on a judgment note given by defendant to plaintiff. On March 18th, 1835, a petition supported by affidavit, was made by defendant to vorte and set aside the judgment, to which petition an amendment was filed on March 38th, 1935. In the amended petition it is stated that Absolum Eshoo, also known as absolom theoo Daniel, the a ker of the note, had a good defense to the action upon its merits; that on March Elst, 1930, he borrowed the sum of 1,730.35 from the purintiff, and as evidence of the indebtedness, executed the note in question, due and payable one year after its date, with interest at the rate of six per cent per annum; that subsequently plaintiff became indebted to the defendant in excess of the face value of the note, together with any accrued interest thereon, and entered into an agreement with defendant that the indebtedness shown to be due plaintiff by the note was paid and fully satisfied by on agreement entered into between the parties; that at the time of the execution of this agreement, defendant requested the return of the note from the plaintiff, and was informed by plaintiff that the note had been destroyed or lost. The agreement referred to, entered into between the parties on March 3rd, 1933, was offered and received in evidence, and is as follows:

"This Agreement itnesseth: That the partnership heretofore existing between Arm Kaspar, Sahak Ambar and Abasiam Eshoo be and the same is hereby dissolved by mutual agreement.

a marchill stay of

a V

on monard ball (1997) 11 takinistii

A state of the second of the s

the interpretary (With Albert 19 for the death of the artist one of the when topp into an or plat to wrone in drings, one on the release we neising a defense of an plantation, for a set of a series of a contraction Also be the rest of the end of the second of the second of the second no beils are interpret as a fille. This of place for with this Loren Side , artist control of the control of the second of the second of trailing the beautiful that a chief of the contract of the con the state of the state and the state of the in the graduation of all 1, 200, 200, 1, 200 were wit the worker as all 1901. and and the state of the content of the state of the stat is often with a discrete with the color of the color of the color a. In realizado destruir con continuo quistros contra direita estamenta de comun del tido the defendant to it through of the minum and to be a set in the piece. gai announce an anni . Walso Pro . dourest de coulai longra, yar defending the tar the circletedness could be as the target to e trans wint boriles during the respectful the gille see his see stan tion y the family of the court was a control of the court dolor and tropped to meture of to note that the tropped and wis interpret in the fact that the more hard but the grain in the grain of the contract of the the eggs int reviews to, entered inno all control of the Moren toda, 1000, one office de and and the land and the good to the 0.00

- Company of the state of the s

"It is further agreed that an accounting has been had between all the parties and that there is no money due from any one of these parties to any one or more of the others.

"It is further agreed that all accounts of receipts and expenditures, of profits and losses, between the parties hereto, as such partners and individually have been heretofore fully accounted for and settled, and all of the parties hereto hereby declare that they do by this instrument hereby release each other from all claims of every kind and character arising out of the said partnership, or individually, that they or either of them have had against each other from the beginning of the world until now: It being agreed that this instrument shall be and is a full and complete release by each of said parties to the other parties hereto and each and every one of them.

"Witness our hands and seals at Chicago, Illinois, this 3rd day of March, A. D., 1933.

Aram Kaspar (Seal) Sahak Kambar (Seal) Absalom Eshoo, (Seal)

Upon the filing of this petition, an order was entered by the court on April 3rd, 1935, directing that the judgment be opened and that defendant be given le ve to appear and defend, that the judgment stand as security, and that execution be stayed until the further order of the court. After a hearing, judgment was entered against plaintiff for costs. From this judgment, this agged is being prosecuted.

Defendant testified to the effect that the parties to the agreement had a "building partnership" in a building located at 1831 Balmoral evenue, in the City of Chicago. Although defendant's testimony as to the relations between himself, plaintiff and mamber, is somewhat confusing, we conclude from it that the parties to this agreement owned the building referred to, as partners. He testified that at the time he and the others, entered into the partnership, defendant executed the note in question, and that at that time there were two mortgages on the premises; that defendant made payments on a second mortgage on the property at the rate of 50.00 per month, and that the first mortgage amounted to 6,500.00; that after defendant had made payments on the second mortgage for three years, the partners concluded that they could not carry the property any longer and decided to give it up, and that they then deeded it to the first mortgagee, and that they then decided that they would

The state of the second of the

The second secon

this ere are are a common or the contract of t

deem the stiffs of this orearies, as events to a server by a server of the server on the server on a server of the ser

The state of the s

longer out ecomese so give it an, and that they then trough in no

regard the whole matter at an end. He testified that it was at this time the agreement referred to was entered into. Defendant further testified that "we", presumably meaning the three partners, made a deed to the first mortgagee for a consideration of 1000.00, paid to the partners, which sum was split between them in equal parts. He also testified that when the partnership was entered into, Ramber put up 1500.00, plaintiff 11,000.00, and that defendant have the note upon which this action is predicated.

Kamber, the other partner, testified on behalf of plaintiff to the effect that the three partners purchased the real estate here-inbefore referred to for [15,500.00, and operated the building together until 1933, when he signed the agreement entered into between the three parties on the date shown by the instrument, and that he received no consideration from defendant at the time the document was signed. This mitness also testified that he made certain payments on the second mortgage indebtedness.

Kaspar, the plaintiff, testified that there never was an accounting between the parties; that defendant never asked for his note, and that he never told the defendant the note was lost.

obtained by fraud, and, therefore, is not binding. The record indicates that all the parties to this transaction were literate, that English they could each read and write and no evidence are produced to indicate that the signature of either was obtained by fraud. Except for plaintiff's statement, there is nothing to show that each had not made a full accounting with the others. The contract itself indicates that this is true. From the language of the agreement, it appears that it was to amount to a full settlement of any and all the then pending matters between the parties, and a full release of any claim which each might have against the other.

The judgment is affirmed.

AFFIRMED.

The plant of the contract of t

nga a toprove object and the fill the filter in the plant of the second section of the second section and the second section of the second second section of the second section sectio

-considering the control of the cont

ine guigent is stillents.

and the same of th

THE NATIONAL BANK OF THE REPUBLIC
OF CHICAGO, a corporation,

Appellee,

V.

KASPAR AMERICAN STATE BANK, a

corporation,

Appellant.

MR. JUSTICE HALL DELIVERED THE OFINION OF THE COURT.

This is an appeal from a judgment in favor of the National Bank of the Republic of Chicago, a corporation, nations the Resper American State Bank, for the sum of [3,680.00], entered on December 12th, 1935. The trial was before a jury, which returned a verdict for the amount of the judgment appealed from.

The action is based upon the charge that the defendant bank received from the plaintiff bank and the Standard Frust & Savings Bank the proceeds of a series of for ed checks. - 148 in number. Sixty of the checks were drawn a sinst the Standard trust & d vings Bank, and eighty-two against the plaintiff bank, The checks drawn against the Standard Trust & Savings Bank were of various dates between July 1st, 1937, and December 31st, 1937, and those drawn against the plaintiff bank were of v rious dates between January 1st, 1928, and June 1st, 1938. It is not disputed but that the proceeds of these checks were paid to the defendant bank. On January 3nd, 1928, the Standard Trust & Savings Bank consolidated with the plaintiff bank, and assigned, transferred and conveyed to the plaintiff bank all right, title and interact in and to the sums of money claimed to be owed by reason of the forestid matters, and the right of action to recover upon the checks. The checks were all payroll checks of the Burton-Dixie Corporation, and were drawn by an employee of that corporation. It is claimed that the endorsement of the name of a payee upon each of these checks was forged thereon by one Stanley Stenkovitch, the foreman of the Borton-Dixie Corporation. The

The section of the se

District of the state of the st

The cossination of the control of th

A Horizon and I put on the control of some that the control of the

imandevising the Year Labor Pictor Religion of the content days on the ex-

evidence as to the forced endorsements on the checks is substantially as follows: The employees to whom these checks were issued and whose names it is charged were forged thereon, were eighteen in number. Five of the eighteen payees of the checks, testified that the endorsements on these checks, were not theirs, and that they had not authorized anyone to endorse their names thereon. This testimony involved thirty-seven of the checks. It is in evidence that every reasonable effort was made to locate the payee of the remaining checks, but that they could not be found.

arch H. H fferkamp, employed by the Aurton-Dixie Jorpor tion as an accountant, was shown what was purported to be the genuine signature of Stanley Stenkovitch. He testified that the documents submitted to him were in the handwriting of Stenkovitch. This witness also identified the signature of Ira . Spackey, Auditor of the Burton-Dixie Corporation, and the signer of the checks, as the genuine signature of Spackey. He also testified that he was in ch rge of the issuance of all payroll checks during all the time involved here. Exhibits containing the genuine signature of Stenkovitch mere offered and received in evidence. After examining the handwriting of Stenkovitch and the endorsements on the backs of all the checks, alleged to have been forgeries, Hafferkamp testified that the handwriting of these endorsements was the same as the handwriting on the documents containing what the record indicates is admitted to be the genuine signature and handwriting of Utenkovitch. Hafferkamp further testified that all the payroll checks issued by the surton-Dixie Corporation at the end of each week by the accounting department of this institution were given to stenkovitch for distribution among the employees in the v rious departments. A handgriting expert also testified that the endorsements on the checks were made by stenkovitch.

It is in evidence, and not disputed, that in addition to the endorsement of the payer on each of these checks, each of them

The state of the s

<mark>auži skolo</mark>m (nžis 😁 istoliku istoliku juše, is <sub>k</sub>ratiži eži 💷 👪 402. Afternoon and the late of the control Expressor (in the district CHEPS of the production of the production of the district of the production of the district of the production of the district of the d enterna en la como a la como en la compaña a la compaña de la compaña en desta de la compaña de la compaña de c ong the size of the fig. that is a particle each and a deficited in only That we have a subject to the property of the policy of the out that the control of the state of the state of the control of the control of ala parabatan nahis para ing pindan mangal banya bi iya saman <mark>ei s</mark>ak ការ៉ាស្នាក់ក្រុង រ៉ូក ទី២០ . កាន់សាស នេះ ខាស់សាការ នៅ ប្រសិល្បី ទី២**១ ១៤១៤**៤៤២៣ ond pecalific in a property of the contract of the property of the peak that the contract of t , the restriction of the restriction of the first production of the first production of the restriction of t olimate the bore of the following the following the first that the following Are ly the forterm of the older Date to be a district equation rodinos renordi e prodinodos. Po reisle in los los estas esta estades simil-was trained to the circular teacher is not be included to the similar of th To two impossible learns or the second of the area and the description of wit good grifted and a reflective and a court error emissioned wide employees in the ordinal action in the company of the property of the imateri, e na vinak . Han e ries o mid no same o anhao cad attit beiliades

et luittan si unte present sur present de l'estant de

was endorsed by one like Zupan; that the checks were then deposited with the defendant bank, and that they were paid to the defendant bank through the Chicago clearing house. No effort was made, and no testimony was offered by defendants to refute the above evidence.

The checks referred to were all offered and received in evidence.

Defendant insists that the judgment should be reversed for the reason that the defendant bank received no notice of the alleged forgeries, nor any demand for cayment of the amount collected on these checks, until this proceeding was connenced on October 8th, 1932, and we find nothing in the record to indicate that this is not true.

In Continental Mational Bank of Chicago v. Metropolitan Mational Bank of Chicago, 107 Ill. App. 455, it appears that on February 7th, 1894, the First antional bank of it. Paul, drew and delivered a draft for 33,00 to one Marper, payable to his order, and directed to the Continental Sank of Chicago. Prior to February 9th, 1894, the draft was raised to 3,300, to, and was presented to the Continental Bank of Chicago for certification and acceptance, It was accepted, and 3,300.00 was charged upon its books to the First National Bank of St. Faul after the check had been certified, Thereafter, on or about sebruary 9th, 1894, the check was deposited by Harper with the American Trust & Savings Sank of Chicago and credited to his account in good faith, so far as that bank was concerned, and Marper drew against his current credit account with the last bank, which credit account included the raised check. About February 10th, following, the American Trust & Savings Bank, after having credited the 3,300.00 to Harper's account, deposited the draft with the Metropolitan National Mank of Chicago, and this letter bank gave the American Trust & Savings dank credit for the 3,300.00, and on the same day sent the draft through the clearing house, where on February 10th, it was paid by the Continental Mank of Chicago to

the Metropolitan National Bank of Chicago. On November 39th, 1898,

A the second by an est of a part of

the database of the same and th and the grant of the property of the control of the ting the property of the second of the second of the property of the second of er in a man the man is a great in a south transmission to the partition To another order to the second of the second Proposition of the committee of the comm infrare filter with the second many that we have a second and different And the residual terms of the rest for a second to the second ended a continu latin of an demis oil from fire promit for no so post onom, the constituent of the congestion of the constituent will be a second by the the lattice with a rest to the gallone of the distance of the databases Bulle less the ultimate has the right of the contract of the c proof. Store (sel a not be likel science liftens inline fact that had કાર્યો કાર્યો કેર્યાન કાર્યો કાર્યા કાર્યા કાર્યો કાર્યો કાર્યો કાર્યો કાર્યા ક High Tedas sign ( 1.50) - African . - 53 (CD) - 1 (1.50) \* Dodal . The gulavad the risk test with population will be desired as it is also parties as the desired ្នាល.ក.និ.គឺ នេះជា ២៩៦ ជានៃ ២០ ១៩ - សុក្រនិបករ . ជមួយ។ ១១០និបករ ១៩០ ១៤។ <mark>ជាកាល</mark>់ and on the season is your tire through a colorate normal, reserve on February 1965, it is a raid by the Fourineerel and of Ghierra to the intropositor and of Oligana, in actions anti-

the Continental dank of Chicago wale a demand on the Cetropolitan National Bank of Chicago for the repayment of the dr ft, which demand was refused, and suit was begun by the Continental Bank of Chicago against the Metropolitan National Bank of Chicago on Movember 30th, 1898, to recover the difference between the amount for which the draft was originally drawn, and the amount to which it was raised. as for money paid through mistake by the Continental Bank of Chicago to the Metropolitan Mational Bank of Chicago. In holding that no recovery could be had, this court said:

"We have before us the two questions: (1) Should appellant have notified appellee that the draft had been raised at once upon hearing of the froud, instead of waiting nearly five years before notifying appellee? (3) Should appellant have returned or offered to return to appellee the raised check?

In First National Bank v. Ricker, 71 Ill. 439, it is said: In very many of the cases where it has been held the drawee cannot recover back money inadvertently paid on a forged bill or check, that one element of defense was in not giving prompt notice to the payee or holder, the instrument as a forgery. The tendency of all modern decisions seems to be that, where there has been an unreasonable delay in discovering the forgery and giving notice, it will in every instance bar a recovery by the payor.

In that case notice that the check was a forgery was given within a few hours after payment was made. In chroeder v. Hervey,

75 III. 638, the court say:
'In Simms v. Clarke, 11 III. 137, it was held by this court that in case of a counterfeit bill, the party receiving it must return it within a reasonable time after it is discovered to be spurious or he loses his recourse upon the person from show he received it, and that what shall be considered a reasonable time must necessarily depend upon the situation of the parties and the facts and circumstances of the particular case,

The same principle is declared in Tagee v. Carack, 13 Ill. 289; Union National Bank v. Indenwick, 45 Ill. 376. The rule laid down in this state is, that re-somble diligence is required

in giving notice of forgery after its discovery.

What is reasonable diligence in giving notice is usually a question of fact under the circumstances of each particular case. The books abound in cases where, under the particular facts, periods of omission to give notice from one week to six months were considered such negligence as to preclude recovery of money paid out on forged paper or raised drafts. The Bank of St. Albans v. F. & M. Bank, 10 Vt. 141; 3 Landolph on Jom.

Paper, sec. 1740, and authorities cited in a note.
In the case at bar, appellant and appellee at the time of the transactions in question, were both well known banking houses in the city of Chicago. While ordinarily money paid on a raised draft by mistake may be recovered mack, still if either party has been guilty of negligence or carelessness by which the other has been injured, the negligent party must bear the loss.

doctrine is clear and is sustained by authority.

្រុកស្វារស្សាស្ត្រ ស្រីស្រាស្ត្រ ស្រីស្រាស្ត្រ ស្រីស្រាស្ត្រ ស្ត្រី ស្រីស្ត្រី ស្រីស្ត្រី មេខាង ប្រឹក្សាស្ត្រី im will story to make this profession to the market Dig North Induition y vijato seemo joe 1911. De ego ingret her almo har gleensee was , in a required to be than to the first in the same and increased the same the we weight out to the contract the agency of the test interpret of \$200. gui i e u stim i sa amene dikus. gasent giindininge e dang to for meaning paid standard of the control of the control of the property of the control of the on the state of resorting round to the different title

wir no mickou (1): delvene en omá por nobem eved es<sup>o</sup> no omográfica en el como do se no dede como en sei l**átem eved** The second secon himse and the second of the property of the party of

the state of the s utit en chores, terb no element as betauer e's le best tett. ; <u>ក្រុមព្រះ ២ ២ ១ ១១ ១៩ ១៩៩៩ ២ ១ ស្គាល់ ១២ ១៦ ១៦ ១៦ ១៦ ១៦ ១៩៦១៩៦១៨ ៨៦៣០៨</u>៤ មាននៅ កម្មភពសាភា មហានជា បាន កម្មាំ នេះសនិនជាក់ សេខសេស ជំណាំ ជាកា ខ្លួនសេសស្នានាំ 🐣 and distances to the eight on the eight on the eight of t

grava, a se se rijoudi i se siatem ele ime e solimi. Oeno aliabil d'i within the contract of the contract of the contract of

Titalis and the control of the contr

the garden will be relied to be areas like the transpers as that g feelfer toom in this necessite administration of its originates a ragenigen geit gring junic gaute al Bander before vall "espes ាំព្រះស្រាស់ ស្រាស់ 

tes transcribes in well of the cold will the contract the cold and an expect in the city of the cold and cold a are be a guilty of a compared only filled a thing nerth are be a bear became guilty on a guilty on a collar tea atting has been lagured, to a segal and one property of the land and noctains to bis mad in the antabod of the miles. "Was the delay of appellant in notifying appellee of forgery unreasonable and did it result in injury or loss to appellee? In Leather Mfrs. Bank v. lorgen, 117 U. S. 96, Mr. Justice Harlan, speaking for the court, said:

'If the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank is thereby prejudiced because it was prevented from taking steps by the arrest of the criminal, or by an attachment of his property or other form of proceeding to compel restitution. It is not necessary that it should be made to appear by evidence that benefit would certainly have accrued to the sank from an attempt to secure payment from the criminal. Whether the depositor is to be held as having retified what his clerk did or to have adopted the enecks paid by the cank and charged to him, cannot be made in this action to depend upon a calculation whether the criminal had at the time the forgeries were committed, or subsequently, property sufficient to meet the demands of the bank. As the right to seek and compel restor tion and payment from the person committing the forgeries, was in itself a valuable one, it is sufficient if it appears that the bank by reason of the negligence of the depositors, was prevented from promptly, and, it may be effectively, exercising it. "

We have quoted quite extensively from the case of Continental National Bank v. Metropolitan Actional Bank of Chicago, and the cases there cited, for the reason that the las applying to the instant case is there collected, and is directly in point. The of the opinion that the delay for a period of four years in notifying the defendant bank of the forgeries, defeats plaintiff's right to recover. See also Schroeder v. Marvey, 75 Ill. 638; Mages v. Carmack, 13 Ill. 289; Union Metional Bank v. Meldenwick, 45 Ill. 376.

The judgment is reversed and judgment is entered here against plaintiff for costs.

REVERSED AND JUDGMENT ENTERED HERE FOR COSTS.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

The many of the first at the second s

Air in to til a properation of the standard of

prometiment to ever the weat affections and continue to the even of the second of the

Transporte in the Lambinian in the America

to Troops and Cites and the formation of the continue of the control of the cont

Council is 111. The later theel care, itemates in 111, 101,

ការស្តី និស្ស ១៩០ នូវ និស្សភាពនាថ្ងៃ និស្ស ១០៣៤៣១០ **១៤ ៤៥១១**គ្រ<mark>ិងថ្ងៃ និស</mark>្ស

todisco con thicker in the occops.

yes the state of the first state of the st

Sunt's he didn't by Balle this I willy the Stranding

J. HARRY GREEN.

(Plaintiff) Appellee,

V.

JAMES STEWART CORPORATION, a corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

2691.A. 616

This was an action filed in the Municipal Court of

Chicago to recover consissions alleged to be due the plaintiff

under a contract of employment as an insurance broker. The cause

was tried before a six man jury and resulted in a verdict and judg
ment for the plaintiff of 16,060.34, from which the defendant appeals.

The plaintiff is an insurance broker connected with the Chicago Branch of the Standard accident Insurance Company, of Detroit, Michigan. The Chicago office is located at 175 lest Jackson Boulevard. Plaintiff has office space with the Insurance Company and as compensation receives commissions on insurance business passing through his hands for this company.

In January, 1934, the defendant, James Stewart Dorporation, contemplated submitting a bid to the United states Government for the construction of Look 12, on the Mississippi River. On January 16, 1934, N. C. Consted, vice president of the defendant company, telephoned the Chicago office of the Standard Accident Insurance Company, talked with Maurice J. Beheemsecker, Manager of its Bond Department, and inquired whether the Standard Accident Insurance Company could furnish a bond for the defendant in connection with the contemplated Mississippi River job. Mr. Beheemsecker told Consted that he "rould try to get somebody over there right amy," and then "went back to the Broker's Department and looked around for somebody who was competent to handle it, and talked to Ir.Green."

1

e ... (- 2 .b

(.inladice) - returning

A ST

ନ୍ତୁ ପ୍ରମାନ ଓଡ଼ିଶ୍ୟ । ପ୍ରଥମ ଅଟେ ଅଟେ ଅଟେ ଅଟେ ଅଟେ । ।

(Deformant) . preud nick

THE BUILDING IN THE BEACH OF BEHALVEST OF A COUNTY

The dense liminities of the will be like an income and bill

This is a common the line of the forest and the common and the common of the comm

The illication of the in instrument access state of the the chicago in additional interpretation of the control of the control

A short time after, pursuant to this conversation with Scheemaecker, plaintiff presented himself at plaintiff's office and saw Mr. Onsted. They had never met before, and had never had any business or other dealings with each other. The plaintiff arrived at defendant's office and introduced himself to Onsted and stated he understood the defendant was in the market for a bond to bid on Lock 13 on the Rississippi River, to which (insted replied in the affirmative, saying that he had called the Standard accident Insurance Company, because it had bonded the defendant company in quite a large sum on a previous occasion. Flaintiff testified that upon introducing himself he gave Onsted a business card, which bore the legend, "J. Harry Green & Co., Insurance Brokers, 175 lest Jackson Boulevard, Chicago" with "J. Harry Green" in the lower left-hand corner, and that he told Onsted that he was an insurance broker specializing in bid bonds. and understood contractor's problems, because he was "raised in the building business prior to becoming an insurance broker." Onsted testified that he did not recall plaintiff's handing him his card. though he might have done so, and testified further that plaintiff did not say anything to him about being an insurance and bond broker.

After some discussion regarding the nature of the proposed job, plaintiff left the defendant's office, discussed the matter with the officials of the Standard Accident Insurance Company, and called again at defendant's office the next day, at which time he and Onsted discussed the financial condition of the defendant corporation. Onsted produced the figures for plaintiff and at plaintiff's request that evening prepared and mailed a financial statement to the home office of the Standard Accident Insurance Company, at Detroit, Michigan.

A copy of this statement, defendant's Exhibit 1, was offered in evidence by defendant, but was excluded by the court.

Plaintiff testified that he asked that this information be sent to Detroit, so that Scheemaecker could take it up with the home

resibuly this cold to the relation of the cold the residence of the residence of representation as a representation and people for movemental years etimo, reportante e riima i la la composito anticonomica de constituido de consti And it is the tell of the analysis of the description of the software of the s Talle of Broad the date of and record that the date of the control rain will refer to the contract of the contrac that he had a limit too the ender a fact take a mere to a content. in a contract of the contract 1 m. ž., juženo populiti in a morali morali in kalini ne ližživaživa moralizatamo i zapažnogo. were the programmed twice of the protection of the finance of the second to entre constitue and inverters, William Contractions of the #E . The second of the second as the second or and began the second and generalises. Too to below the determine the water to take and a second of all a court order accepted with the ,e of the term of the first into a control in an area was right to Triving the state of the line of the court of the same and the innest the or top word at wanter from a paid on going tipes the four bib

is the representative and the control of the contro

one meith and the control of the control of the control of the control of these

office, in the morning, and that was the extent of his first conversation concerning defendant's financial standing. After the plaintiff received word from the Standard Accident Insurance Company he went back to defendant's office and told Mr. Onsted that "we would have to bolster up their financial condition." He testified that in the course of this conversation, Onsted told him that defendant had an open line of credit at the Continental Bank for a sufficient amount of money to carry on the entire project; that plaintiff replied. "that was fine, as far as carrying on the project was concerned, but it didn't furnish the cash necessary to underwrite the bond and would not assist us in getting the necessary reinsurance which the companies have to have to execute a bond that size, and that he would have to have additional capital some place: " and that Onsted then said he could get 100,000 from the parent company in New York. Onsted testified plaintiff explained to him that it was customary on bonds of this kind to have liquid assets of approximately 15% of the contract; that defendant's liquid assets were short of the required amount by approximately 1100,000; that plaintiff asked him where defendant would get additional money to carry on the work. if it required it, and that he told plaintiff he could arrange to borrow it. He further testified:

"The time was growing short until we had to put in the bid and I had to leave the city so I told Mr. Green that if he was not able to get that bond, we would have to look elsewhere for it, that I would have to have my bidder's bond by Saturday, because I was leaving town to visit the site and complete the estimating and putting in the bid."

Shortly after January 20, 1934, the plaintiff arrived at defendant's office with a bid bond in his pocket in the penal sum of \$150,000 executed by the Standard Accident Insurance Company, and a printed form of application, and a draft of a letter to be written by the defendant to the Standard Accident Insurance Company. The plaintiff testified that the application form had been filled in and prepared for defendant's signature by the Standard Accident Insurance

ាន ស្រុក is the a morning of the first of ions Jas. ting injures I its pit tind ou graties of owed in the venter of this currently, which is setting erbojno kominento de allo de bosali de o medicale de ought: A form crishe our ou grove of goods to format. គ្នាស្ថាស់ ស្រាស់ ស concerned, but it will be the the concernment of the concernment resignation of its or the form the state of its an item to the said of the they is it to a constitute former of their Dispersion should Chance that the training of the training of the training of . This we will be bridged a grad with well tyloviniment, takka i 11 laut maakanin elemaa thood **as thoodses** to description of non-light of an electric on A (vertices edd to gal The services of the court of the contract feetings and ing to be an all grown on year. I would be not, bloom apprised on the mid nd brown the contributable contribution of the car and details to be a fine to the care in the language of the control

THE STATE OF THE S

defendant a sint of the control of the part of animal such a defendant of the control defendant at the control of the control

Company, and given to him to obtain its execution, and that this draft of the letter to be written to the Standard Accident Insurance Company by the defendant had been prepared under his direction in the office of the insurance company. The application as well as the letter to be written to the Insurance Company in the form indicated, was signed by Onsted, one of the officers of the defendant comparation, and thereupon the plaintiff delivered the executed bid bond to him. The letter which was to be written in the form desired by the Insurance Company followed the form delivered to the defendant, and is as follows:

Standard Accident Insurance Company
175 W. Jackson Boulevard
Chicago, Illinois

Gentlemen: -

RE: Construction of Lock Number 12, Mississippi River, at Bellevue, Iowa.

We attach an application for a bid Bond in connection with the above project.

Please execute this Bid Bond in the amount of \$150,000.00, it being our understanding that at this time you have not secured the necessary reinsurance and/or co-surety to enable you to execute the final bond. In the event that we are the successful bidder for this contract you are not obligated to sign the final bond unless the necessary reinsurance or co-surety is secured, and we will render any assistance necessary to enable you to secure the necessary reinsurance or co-surety.

Yours very truly,
James Stewart Corporation
By H. G. Onsted
Vice President."

Immediately after this last conference between the defendant and Consted, the latter went to Mock Island, Illinois to visit the site and put in a bid on the job. Thile the contract was not awarded at once, he was advised that defendant had made the low bid, of \$1,346,720.00, and would be notified officially later, and returned to Chicago where he again saw plaintiff at defendant's office on the following wednesday morning, January 84, 1934. Onsted told plaintiff that if he was going to get the permanent bond, he would have to hurry, because it would have to accompany the contract, which would have to be signed in ten days. Plaintiff said that he would bring the

Domonay, The Levelin Decree was the level of the structure of the level of the leve

ji in or er eren i spoline hertaede

eld teller dirtiligh de Libraryne († ) E

# 1755 - No. 12 tes light to the least to the state of th

្ត្រី (ស្តីសុខស្នី) ប៉ុន្តែកំណែក ស្រប់ ស្លាប់ ស្តីសុខសុខស្នី (សំនឹង) ប៉ុន្តិកាន់បាល ម៉ែន ប៉ុន្តិ (សំនឹង) ប្រជាពល ប្ជាពល ប្រជាពល ប្រជ

. The contract of the contract

Insert tell, riter serious for manner well and the council and the council tell of the council and end of the council and the council and end of the council and the council and end of the council and end of

Sat parity lines are that there is include an parachet his ben in od of

manager of the Standard coident Insurance Josephy over on the following morning. Flaintiff and Jourise J. Tcheemecker, of this Insurance Company called at the defendant's office and conferred with Onsted regarding the permanent bond. The conversation was principally between chaseworker and Onsted, although the plaintiff was present. The conversation was regarding the financial set-up of the defendant company, and at that time there was a discussion as to the best method of putting in 100,000 in the James Stewart Corporation.

It appears from this meeting that Scheemaecker pointed out that the money that was to be out into the corporation would either have to be contributed in the form of a contribution to surplus or additional capital stock or in the form of a loan with the lender subordinating its right to collect it until all the bills were paid, that is to say, that the 100,000 would stay there during the entire time that the contract bond was in force.

On the morning following this conversation, plaintiff again called at the defendant's office, and while he was there Onsted discussed this bond with A. M. Stewart in New York, over the long distance telephone.

Following Consted's talk with Mr. Stewart of New York, he advised Mr. Green that Mr. Stewart would not agree to go on the bond as indemnity, which had been one of the requirements, and that if they were not able to furnish that bond, Mr. Stewart would have to arrange to get the bond. As a result, the bond was not furnished and the defendant company arranged for a bond elsewhere.

The plaintiff contends that the question of the plaintiff's right to recover upon a contract of employment is one of fact, and this fact having been determined in favor of the plaintiff by the verdict of the jury and the judgment of the court, it is sufficient to justify the affirmance of the judgment by this court. This is

Following members, in the collection of the coll

Die der Scheiner von General in der Scheiner die Ausschleiten der Scheiner der Sche

Casted discussed this restance in the converse case, interested to the converse case, interested to the casted this restance in the casted discussed this restance casted the casted this restance.

The first transfer to the state of the second control of the c

The News Committees of the American States of the American States of the States of the

generally true when there is evidence before the jury to support the plaintiff's claim that a contract exists.

This court in order to determine if there is evidence of a contract will examine the record and endeavor to ascertain if there is any evidence to support plaintiff's claim of employment as a broker to negotiate for the defendant with the Insurance Company for an indemnity bond for the purpose desired by the defendant, and unless there is evidence of the existence of a contract, it is the duty of the court to reverse the judgment, notwithstending the verdict of the jury.

It does not appear to be plaintiff's contention that he seeks to recover upon an express contract, but from what we gather from his argument there was an implied undertaking by the defendant to pay for plaintiff's services rendered as a broker in the negotiation for the issuance of the bond desired by the defendant. There is no evidence, as far as we have been able to find in the record, that the question of the employment of the defendant as a broker was discussed with the plaintiff.

In the instant case, the rule applicable to the question is stated in The People v. Dummer, 274 Ill. 637, as follows:

"A contract is an agreement between competent parties, upon a consideration sufficient in law, to do or not to do a particular thing. (2 Blackstone's Com. 442; 2 Kent's Com. 449; 1 Parsons on Contracts, sec. 1.) It may be express where the terms of the agreement are declared by the parties in writing or verbally at the time it is entered into, and, of course, there is no express promise by a property owner involved in a levy of taxes upon his property and none was claimed in this case. A contract may be implied where an agreement in fact is presumed from the acts of the parties, and this is the proper meaning of an implied contract. An illustration of such a contract is where one performs services for another under circumstances showing that they were not intended to be gratuitous and the services are accepted. \* \* \* The only difference between an express contract and an implied contract in the proper sense is, that in the former the parties arrive at an agreement by words, either verbal or written, while in the latter the agreement is arrived at by a consideration of their acts and conduct. (2 Page on Contracts, sec. 771.)#

rommarally fruit the view of the view of the control of the contr

This manual is a subject to the subject of the subj

THE REPORT OF THE PARTY OF THE

្សាធំពេញ រាស់មានប្រជាពល ប្រធាន មាន មាន មាន ប្រជាពិសាធាន និង មាននិយាន 🖑 John to 76 gra ti (si . n , se maseri su tavas i i jaka .mot In light to the self-build on a street with the self-build self-building. COME COSTS COMMENTS AS IL THES THE PROSECUTION WE WELL SEED AS ជាសេញ ក្រុម ខ្យុង ហ្គាំ មេខ្លាំ សម្រាស់ សម្រាស់ សមា និង មានរៀប **រូបសេ**សមា មិន្ត involved in a tery or taxes and see the trotter. permonentaged days revolved appropriate accepte postre refer to a restrict a restrict of the refer of in the restriction was a second of the reliable market and the first of the control of the restriction of the control of the restriction of the re . The major to the majores and the substitution of the habitest for between the substitution of the substi en in died cords of in the stores erse in, the se seemen I menor medicine, menoral dan arappa dan meter meningan mela by a consider that of their classes are considered, it is come The same and the same

The evidence indicates that the plaintiff as an insurance broker had office space and telephone service, without expense to him, with the Chicago Office of the Standard Accident Insurance Company of Detroit, Wichigan, located at 175 west Jackson Blvd; that he received commissions from this company for insurance business initiated by him and transacted by the company.

As to an express understanding regarding the transaction considered by the parties in the instant case, the record is silent. The question of an amount to be paid to plaintiff by the defendant was not discussed. The plaintiff seems to indicate from his acts that he was acting for the insurance company rather than for the defendant.

After the officer of the defendant company telephoned and talked with the manager of the insurance company, the manager directed the plaintiff to take up with the defendant the question of the furnishing of a bond by the insurance company. The plaintiff at that time was not acquainted with the defendant or its officers, and got in touch with the defendant only when he was directed by the manager of the insurance company to take up the question of a bond with the defendant.

The bond required was one that was to be furnished by the defendant upon the acceptance by the U.S. Government of its bid for the construction of Look 13 on the Mississippi River.

The plaintiff lays special stress upon the fact that the defendant first consulted with one Parish, a bond broker, and was unable to obtain a bond through this broker for the purpose indicated in this opinion. Just what this had to do with the question here, is not clear. The plaintiff must recover, if at all, upon the evidence signifying employment, and not upon what Mr. Parish, the broker, did or did not do.

It would seem only reasonable that the plaintiff should have indicated that for his efforts in this regard he would accept

,

in Alone the children of all presented from the children of th

The product of the control of a large of the control of the contro

For letter than the second of the control of the co

if rould on a culy recognists the judestif sheeld have independent and the sector sectors.

compensation from the defendant, irrespective of the success of the enterprise.

Plaintiff's evidence is clear that for insurance business turned over to the company with which he was connected he would receive 30% of the premium paid, and when he received a premium of \$5.00 for the bid bond, so-called, from the defendant, he would deduct 30% of this amount and turn over the balance of .3.50 to the insurance company.

## Plaintiff testified:

"I sent the Stewart Company a bill for \$5.00 (for the original bid bond). They paid me \$5.00. I deducted 30 per cent and paid the company 3.50. On the other dealings with the other matters I discussed I said I would have billed the company for the premium that would be 1 per cent of the total amount of the contract. I would bill them 100 per cent and pay the Standard Accident Company 70 per cent. I deal in surety bonds and not in merchandise. I buy them for seventy and sell them for one hundred. The difference is my brokerage."

As to the connection of the plaintiff with the insurance company, the manager, Mr. Scheemaecker, testified:

"Mr. Green has no connection with the Standard Accident Insurance Company except as a broker. Green is in the same category as is all office brokers. We expect him to give us first choice of his business. If he doesn't we probably wouldn't permit him to use the space that he does. However, he has a right to take his business any place he should please."

As we have already stated, the evidence does not indicate that an agreement was entered into between the plaintiff and the defendant that the plaintiff should render services for the defendant in consideration of compensation to be paid by the defendant.

It would seem that plaintiff was a broker in the insurance company's office, and that this company expected the plaintiff to give the insurance company "first choice of his business. If he doesn't we probably wouldn't permit him to use the space that he does." This position of the company, no doubt, was predicated upon the fact that plaintiff was a broker in its office and was furnished space and the use of the telephone without charge, for which the company had first call upon his services. The defendant, of course, had no

A CONTRACTOR CONTRACTOR OF THE CONTRACTOR OF

AND THE STATE OF T

son marki rak siir kuudise kus iiisteeskan sii sa k

រំបស់ទីស្នាក់ ប្រាស៊ីន ខាល់ខាន់ និង និង និង និង ស្រាស់ ស្

is set here the eyers of this extent that come not beauty to the set of the extent that I limits out that the theory of the extent that the limits out the eighth of the extent that the extent the extent that the extent tha

it sould eath to its this man and a lister of the inverse of company a office, and the table this country as expensed the minist, and the following as sould be ministed the minister of the industrials and the description of the country as its to the minister of the country as its and the use that product is a country as its arrival and the use of the test to the country and the use of the test to the country and the use of the test to the country and the use of the test to the country and the use of the test to the country and the country and these to the test to the country and the country and these to the test to the country and the country and these to the test to the country and these to the country and these to the country and these to the country and the country and these to the country and the country and these to the country and th

knowledge of this business arrangement of the plaintiff with the insurance company, and that plaintiff was not altogether free to act for the defendant upon the question of the insurance it desired.

This court in the case of <u>Voit Aubber Co.</u> v. <u>Pecris Coca</u>
<u>Cole Bottling Co.</u>, 280 Ill. App. 14, upon the cuestion of what must appear from the evidence in order to establish a contract between the parties, said:

"A contract of sale, whether express or implied, must contain the essential elements of a contract - an offer and an acceptance of the offer. The offer must be communicated to the one who is to be the acceptor thereof, and its communication must be under such conditions that the one who receives it is aware that an offer to enter into a contract has been made to him. An implied contract in fact cannot be thrust upon a person by the courts without his consent. Unless it appears that his intention was to enter into contractual relation with another we cannot say that he has done so."

The rule in general is, and it needs no citation of authorities, that a person cannot act for both the company and the assured unless he does so with the consent of both parties. While it is true that where a broker obtains a policy for the assured, he shall be deemed to be the agent of the assured, still this may be overcome by the fact that the broker may have acted as the agent of the company in regard to the policy.

In Lycoming Fire Ins. Co. v. Fard, 90 Ill. 545, the Supreme Court said:

"Puschman was, at the time, an insurance broker or a street solicitor of insurance. He came to the plaintiff and represented that he was agent for the Lycoming Fire Insurance Company and the German Insurance Company of Freeport, and solicited the risk upon her property. \* \* \*

Freeport, and solicited the risk upon her property. \* \* \*

\* \*If the plaintiff dealt with Puschman as the agent of the company, believing him to be such, and did not employ him to act for her as her broker in obtaining the insurance, he would have no power to act for or bind her. \* \* \*.

The street broker was not the agent of the plaintiff for any purpose. If the evidence be true, he had no authority to act for her or bind her in any manner whatever by what he might do in the premises, and while he may not have been, in fact, the agent of the company, still, the company, by placing the policy in the hands of the street broker for delivery, is estopped from claiming that the payment made to him upon delivery of the policy is not binding upon the company."

in a light of the state of the

And the second of the control of the

The main with a particle of a form of the first of

The context of the second of the context of the con

more than the contract of the second of the second of

## alder Heat

Tamor of the control of the control

And also in Rewark Fire Ins. Jo. v. Sammons, et al, 110 Ill. 166, the court said:

"It is true that a clause in the policy declares that where a broker obtains the policy, as was the case here, he shall be deemed to be the agent of the assured in any transaction relating to the insurance; but a clause of this character can not overcome the fact that the brokers may have acted as agents of the company in some matter in connection with the policy, if such is the fact, as has been held by this court in Commercial Ins. Co. v. Ives, 56 Ill. 406, and Union Ins. Co. v. Chipp, 93 id. 100."

And again in <u>loston Store</u> v. <u>Martford Accident & Indomnity Co.</u>, 227 Ill. App. 192, the court said:

"Although ordinarily an insurance broker is considered the agent of the assured and not of the insurance company, sometimes the actions of the company and its dealings with the broker create the relation of principal and agent between the company and the broker. In 23 Cyc. 1427, it is said:
'A person may become authorized to bind the company as its agent not only by formal appointment as such a ent, but also by being authorized by implication to act on behalf of the company in relation to its business, \* \* \*. The authority of the agent is often sufficiently indicated by the general course of business in which he acts for the company, such course of business being known to the company and not objected to. !"

The plaintiff in this matter acted as the agent of the Standard Accident Insurance Company rather than that of the defendant. As we have indicated in this opinion, he was first employed and directed to act with reference to this matter by the manager of the Insurance Company, received his instruction from the manager, executed a bid bond for the insurance company, and procured and accepted the application and other documents for and on behalf of this company. It does not appear from the evidence that he ever received any instructions from the defendant, or that he was requested or employed to act for the defendant, or rendered any service whatever to the defendant, except for the insurance company, and upon these facts we believe that he has not established from the facts in evidence that the defendant entered into contractual relations with the plaintiff, for which he now seeks to recover commissions claimed to be due.

And march to the time of the second s

The experimental management of the contract of

The classical sections of the control of the contro

socialisticas en in a more en ince

The fact is called to the attention of the court that even if plintiff had been employed by the defendent as its broker, he still would not be entitled to collect commissions from the defendant, because it able is that the Standard socident Insurance Company refused to issue the bond required, unless and until the defendant complied with the conditions laid down by it, and the defendant points to this fact: That Scheemaecker, the Lanager of the Standard Accident Insurance Jumpany's Bond Department, testified that he told Costed, in the plaintiff's presence, that defendant would not only have to raise 100,000 to be eligible for a Standard bond, but would have to raise it in a special and reculiar way, namely, by a "subordinated" loan or an addition to its capital stock, or, in the alternative, procure "indemnity" for the Standard from defendant's parent comeny. In the application for the bid bond, defendant stated that it had arranged a loan of 100,000 for the purpose of handling this contract, and that this sum was available as a loan when and as required for the job, which was not denied by the plaintiff. But it appears from the testimony of plaintiff's witnesses that the samer of providing working capital was not acceptable to the Standard Company, and that the company refused to write the bond unless the other and further conditions laid down by it were complied with. It is apparent that the insurance company was not ready, able and willing to furnish the bond as required by the defendant. Therefore, if we assume that the plaintiff was employed as defendant's broker, he could not recover compens tion for commissions for the issuance of a bond which was not furnished or tendered to the defendant.

Other questions are raised by the defendant, but in view of our conclusion upon the question of the employment of the plaintiff, it will not be necessary to consider them.

Judgment for the plaintiff is reversed and the cause is remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

owen if it is in the control of the superior of the control of the operator o geniù arro la loughan di hudiafats du las cher diffic se degrant and provided the result of the result of the results of th or in 186 and a second of selections of the second of the second second of the second to the profession of the second for the second control of the seco is employed the promise the contract of the contract of admits the contract of to the first production of the second section of the first section of th m to a manager of the contract of the second of the go criica a la lase a mi di colo el tra libra imi ghadd arasig, of a forboriin tell lens is in additit to the local Afril quads, or in the little time, account his landing of the early and detendental commission of the description of the fact of the the first of the first of the second of the reduced to the control of the design of the control go fadere dia no con Minigación in molinorálment en Rocción a el por el pr affinition that is given in a comparable of the state of tem no 1 figure of the course some temperature belowed by a comparing ga tego a garanda ad tal. Duca garanchi in im di tali. Delimb<mark>elakanama</mark> THE REST CONTROL OF A SECURE TRANSPORT FOR THOSE ORDERED BOTH BASES AND PARTY. typnis og væga mingri boga þermi lemman og þá milli ski ú þá til þermi smæði þá no locile no na Spake a la lave nazinaž liki sensel i jyt ne kom om the defined it. Assert to brown the contract of the section of the desired of the section of the will modifie to mere an occord and believe the grassame alone that the beauty as ten karajar je dom sjem dolar fin i tre komeratik se bol arsizazimac terminal as the enterminal

.

Start - 1911 to the confidence of the confidence

at each court of the later of the formation of the particular of the particular of the same of the sam

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

Plaintiff in Error.

ERROR TO

41

V.

EDWARD STANTON,

MUNICIPAL COURT

OF CHICAGO.

289 I.A. 616

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By writ of error defendent seeks the reversal of a judgment of the Municipal Court of Chicago, entered on July 6th, 1936. In a trial before the court, without a jury, the court found that "the defendent is guilty of the criminal offense of maliciously shifting the starting device or gear of an automobile in the absence or without the consent of the owner thereof," Thereupon, defendent was sentenced to serve a term of nine months in the Mouse of Correction and to pay a fine of \$100.00.

The information filed in the cause is in words and figures as follows:

"State of Illinois )
County of Cook
City of Chicago

## IN THE MUNICIPAL COURT OF CHICAGO

John Szafarczyk a resident of the City of Chicago in the State aforesaid, in his own proper person, comes now here into court, and in the name and by the authority of the People of the State of Illinois, gives the court to be informed and understand that Edward Stanton heretofore, to-wit: on the fourth day of July A. D. 1936, at the City of Chicago afores id iid then and there unlawfully and intentionally, and mithout the authority from the owner, to start or cause to be started the motor of a motor vehicle, or to maliciously shift or change the starting device or gears of a standing motor vehicle to a position other than that in which it was left by the owner of the said motor vehicle, to-wit:

A 1936 Pontiac Sedan, Motor No. 6-157-196 In viol., of Par. 439 Chap. 38 S. & H. R. S. 1931

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the Feople of the State of Illinois.

> (X) Sohn J. Szafarczyk 9543 Charles

in the second of the second of

of the samial is second and waters, where the same from the transfer of the same of the sa

(redisol a

alosi i. to obeda'.' Enoi to the to the control of the transition of the control of the control

18 (1924) 186: Olan III (1924)

John Poff Torythe Training of the sity of the 100 on the state of John on the state of the control of the control of the state of the state of the state of the control of

A ballouting obtaing Labor.c. -107-103 in tiell, of the 489 object by the M. C. . 1891

contrary to the form of the chapte in such o or and and widely raide, but contrary of the area of contrary.

lignomich yn 16 miet (8) golinnich Net State of Illinois County of Cook City of Chicago SS.

(X) John J. Szafarczyk, being first duly sworn, on his oath, deposes and says that he resides at --- that he has read the foregoing information by ---- subscribed and that the same is true.

(X) John J. Szafarczyk

Subscribed and sworn to before me this - - - day of - -A. D., 193- -,

(Signed) Richard Frohlich, Clerk of the Municipal Court of Chicago."

No report of the evidence taken in the proceeding in the Municipal Court of Chicago is in the record filed here. The act which defendant is charged with violating, described in the information as "Par. 439, Chap. 38, 3. & H. R. 5. 1931," is found in Par. 439, Chap. 38, Smith-Murd Illinois Revised Statutes, 1931, and is as follows:

"An Act to make unlawful the damaging or unauthorized tampering or meddling with a motor vehicle or with the motor or other parts thereof, and providing a penalty therefor. (Approved June 27, 1917. L. 1917, P. 349.)

"Tampering with any motor vehicle. Be it enacted by thethe People of the State of Illinois, represented in the General Assembly: That it shall be unlawful for any person, intentionally and without authority from the owner, to start or cause to be started the motor of any motor vehicle, or to maliciously shift or change the starting device or gears of a standing motor vehicle, to a position other than that in which it was left by the owner or driver of said motor vehicle; and it shall be unlawful to intentionally cut, mark, scratch or damage the chassis, running gear, body, sides, top, covering or upholstering of any motor vehicle, the property of another, or to intentionally cut, mash, mark, destroy or damage such motor vehicle, or any of the accessories, equipment, appurtenances or attachments thereof, or any spare or extra parts thereon being or thereto attached, without the permission of the owner thereof, or to intentionally release the brake upon any standing motor vehicle, with intent to injure soid mechine or cause the same to be removed without the consent of the owner, any person who shall violate any of the provisions of this act shall, upon conviction thereof, be confined in the county jail, or sentenced to labor in the workhouse of the county, city or town where the conviction is had, or on the streets or alleys of the city or on the public roads in the county, or to such labor under the direction of the sheriff, as the county board may provide for, not exceeding one (1) year, or fined not exceeding two hundred (\$200) dollars, or both.

"The words 'motor vehiche' shall include automobile, locomobiles and all other vehicle propelled otherwise than by puscular power, except motor bicycles, traction engines and road rollers, the cars of electric and steam railways and other motor

vehicles running only upon rails or tracks."

o, mi, a de viito

(4) John James Jam

In the man was lost on smore on order was a leaderg - - - 12 1. e x 2 2 .

ty and the realist was a second of all or an indications. which discretizes to the discretized and, front-book in the instruc-183<sub>9</sub> script of the collection and the decided in the series of the first

Lempho, burburgo godini i in tro-frantze de mili ing ito i **sa**kt per en la la la compresenta de la differencia de la compresa del compresa de la compresa de la compresa del compresa de la compresa del la compresa de la compresa del la compresa de la c

The state of the s ing the form of the state of th e to reing go origen in a to be a to dile girosistic ly - ; leidin rojac od . - vroden so soman . - gá aleicear di The contract of the contract o value. The first in the constant of the sile of the constant o suche, to so almidate a time of, so or fine or to make file, ma quin quimer e ce en en en en en el ci comi de l'ordeises re applient of thems of a trace of the contractor will alread whom under hit is an early politic ready is the the utility of an entity, in o, himbe and all thin is set he religious. Wit reque to diapply the first (T) the Supplement and the explanation for . The no . markline (At ) bashers and amibarote

with smaller abundant his de this to a sacri error off? nd derveri och a leille and eisidet grate al kar eritteresei i in the medical models of thought ander the car town collocate mos w worth in the star of the beautiful to the star as I seculled · to sain oner af a minner telokibe Defendant seeks the reversal of the judgment for the following reasons; that the information is void on its face; that the defendant was denied counsel, and that the judgment in itself is void.

We find nothing in the record to indicate whether or not motions were made in the trial court, to quash the information, for a new trial, or in arrest of judgment. Therefore, we will presume that no such motions were made.

In <u>Feople</u> v. <u>Frystalski</u>, 358 III. 198, the Supreme Court said:

"No motion to quash the information nor in arrest of judgment was made by Hazel Renke. Where the court is by statute given jurisdiction of the subject matter of the offense, insufficiency of an information or indictment, when not raised by motion to quash or in arrest of judgment, is waived."

As to the question of whether or not the information is sufficient, we cite Chapter 38, paragraph 716, section 6, Smith-Hurd, Illinois Revised Statutes, 1931, which is as follows:

"Every indictment or accuse tion of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statutes creating the offense, or so plainly that the nature of the offense may be easily understood by the jury."

Counsel states that in the trial, defendant was deprived of the right of counsel. Except counsel's statement, there is nothing to indicate whether this is true or not. Prior to entering the judgment, in addition to its finding referred to, the court entered the following finding:

"The people being now here represented by the State's Attorney and said defendant being present in his own proper person and not represented by counsel and the trial of this cause is now here entered upon before the court without a jury, and the court, after hearing all the testimony of the witnesses and the arguments of counsel, and being fully advised in the premises, renders the following finding, to-wit:

'The court finds the defendant guilty in the manner and form as charged in the information herein, wherefore it is ordered that the same be entered of record herein.'"

The transfer of the first of th

to the manager of the control of the

in . sole v. fr. as the Car . II. and . The leave of . welcon of

ំព្រះ ខ្លះបញ្ជា និយាស្ថា សុខភាព សេទសិក្សិក និយៈ ខេត្ត ខេត្ត សេចសិក្សិកម ប្រសិង សូមី ការ ម៉ោយមុខ ២០៦ ក្រាមក ខេត្តប្រើកាស់ សិខភា សេក្សិក សិក្សិក សិក្សិក ស្នាក់ ប៉ុន្តែ ស្រាមសិក្សិក កាស់ ការ សេចសិក្សិក ខេត្តបាន ១៤៦ ខេត្តបាន សេចសិក្សិក ស្រាមការ ប្រែការប្រែការប្រែការប្រែការប្រែការ ស្រាមនិយាយ ទីពេល សេចសិក ស្រាមការប្រជាពល់ សេចសិក្សិក សេចសិក្សិក សេចសិក្សិក សេចសិក្សិក សេចសិក្សិក សេចសិក្សិក សិក្សិក សិក្សិក សេចស្វាស់ សេចសិក្សិក សេចសិក្សិក សេចសិក្សិក សេចសិក្សិក សេចសិក្សិក សេចសិក្សិក សេចសិក្សិក សេចសិក

and the construction of th

LF its open, notes of the role of the role of the continue to the little of the least of the second of the continue of the role of the rol

Secure discussed of an analysis of the last that is a province of a solvent of the constituted of an anti-side of the constitution of anti-side of an anti-sid

igne george, and wit giold, drawmail en ema minik byzare entit A ski madegrap giorn e pui egaini ski ni la made na mysi Alimiani, les en ky e dan de ouer als 4 sit byzaken whether the defendant requested the court to appoint counsel for him, or whether he went to trial voluntarily without being represented by counsel, also does not appear from the record.

In The People v. Parcora, 358 Ill. 448, the Supreme Court said:

"The court in the trial of criminal cases is bound to see that counsel is provided, when requested, for defendants unable to procure such assistance. It is a matter of common knowledge that in a court such as the municipal court of Chicago hundreds of cases are heard without the intervention of counsel. In the absence of a sufficient showing to the contrary, this court must presume that the judge hearing this case in the municipal court did not deny a request for the services of counsel."

After reading the statute which defendant is charged with violating, together with the information, we conclude that the information, upon which the trial was had, sufficiently apprised the defendant of the charge against him, and that the other grounds urged for reversal are without merit. Therefore, the judgment of the Municipal Court is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

non Entre of December 14. The second on David Constant of Second o

11 21 1

A constant of the constant of

Which in a new man white the page of contrains that pale from a milk.

visit time, esquessor en proposition de la transcribit de la constant de la transcribit de la constant de la co

11 11 11 11 11

\* \* \* \*

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

V.

EDWARD STANTON,

Plaintiff in Error.

1

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

289 I.A. 616

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

In this case a rehearing was granted on petition of defendant. After considering the petition, it is the order of the court that the original coinion stand, and that the judgment of the Municipal Court of Chicago be affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

The residence of the end of the sale and the sale and sale and and the description of the sale and the sale a

JOHN T. KAMEN and MINNIE F. KAMEN, for the use of PATRICK W. MURPHY,

(Plaintiff) Appellee,

V.

CHICAGO COIL SPRING COMPANY, a corporation,

(Garnishee) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

289 I.A. 6177

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The appeal in this court is by the Chicago Coil Spring Company, a corpor tion, as garnishee, from a final order entered in a garnishment proceeding in the Municipal Court of Chicago, on January 23, 1936. Upon a hearing the judgment order found the issues against the garnishee and further found that there was due from the defendant as garnishee the sum of \$150.00, and that the sum be had and recovered for the use of the plaintiff.

ceeding was had was one in which ratrick . Surphy was plaintiff and John T. Kamen and winnie F. Kamen were defendants. In that suit the plaintiff claimed from the defendants the sum of 2,937.50, and accrued interest on five first mortgage gold bonds which had been executed by the defendants. Plaintiff alleged that he was the bearer of said bonds and entitled to the face value of the bonds, plus interest at the rate of seven per cent per annum.

Service was had on the defendants, who failed to appear, and a default judgment was entered against them on July 5, 1935, in the sum of 12,937.50. On August 30, 1935, a general execution was issued by the Clerk of the Municipal Court of Chicago. This execution was returned by the bailiff of the court with the endorsement thereon, "No part satisfied" on the day that the same was placed in his hands, August 30, 1935.

Substitution of the substi

(.313/4/41)

on the first term of the second constants.

The transfer of the second (management)

From the state of the state of

Sourcesy, a course district of the course of the consequence of the co

Here the relies of the contract of the contrac

ent on the set of the ordered and the set of the order of the ordered or the ordered of the ordered ordered or the ordered of the ordered orde

On November 19, 1935, \* practipe and statement of claim for garnishment was filed by the plaintiff in the Municipal Court of Chicago. On the same day the clerk issued a garnishment summons which was served on Chicago Coil Spring Company, returnable November 26, 1935. This garnishee defendant filed an answer on December 13, 1935, to the interrogatories propounded to it by Patrick W. Murphy.

Thereafter a hearing was had before the court, and on January 33, 1936, the court in the gernishment proceeding found in fevor of the plaintiff, and entered judgment against the earnishee defendant, and it is from this order that the appeal was taken.

One of the errors assigned by the garnishee is that the judgment against the garnishee was erroneous because the bailiff returned the execution endorsed thereon, "No Part Satisfied" immediately after the same was is sued, although the plaintiff knew that certain real estate was owned by the defendant in the original action out of which he could have satisfied his judgment.

The prinishment action against the prinishee is a statutory proceeding, and it is necessary before the process of garnishment on a judgment can legally issue that there shall be a return of the execution issued on the judgment "No Property Found." In this case the record shows that the return of the execution in the hands of the failiff was endorsed, "No Part Satisfied". Sec. 1 Oh. 62, of the Garnishment Act, Ill. St. Bar Stats. 1935, is in these words:

"Thenever a judgment shall be rendered by any court of record, or any justice of the peace in this State, and an execution against the defendant or defendants in such judgment shall be returned by the proper officer 'No Property found', on the affidavit of the plaintiff, or other credible person, being filed with the clerk of such court or justice of the peace, that said defendant or defendants has or have no property within the knowledge of such affiant, in his or their possession, liable to execution, and that such affiant hath just reason to believe that any other person is indebted to such defendant, or defendants, or to either or any of such defendants, or hath any effects or estate of such defendant. or defendants or of either or any of such defendants, in his possession custody or charge, it shall be lawful for such clerk or justice of the peace to issue a summons against the person supposed to be indebted to, or supposed to have any of the effects or estate of the said defendant, or defendants, TALLE LO CONTROL OF THE STANDARD CONTROL OF THE STANDARD STANDARD CONTROL OF THE STANDARD CONTROL OF T

The month of a large of the control of the control

Une of the control of the control of the control of the control of the judgment judgment equing the control of the control of

The unrelative of the contract of the contract

\* hearest juli rat at list and list and at least and at a control at a

or of either or any of such defendents, commending him to appear before said court or justice, as a parnishee; and said court or justice of the peace shall examine and proceed against such garnishee or garnishees, in the same manner as is required by law against garnishees in original attachments."

From this provision of the Garnishment Act it is clear that the return on the execution did not comply with the provision of the statute that the execution be returned by the officer, "No property found". On the contrary, the return on the execution was, "No Part Satisfied."

Vault Co., 97 Ill. App. 439, a proceeding of this character, this court said:

"The proceeding is statutory and can not be extended beyond the plain provisions of the statute. Ill. C. R. R. Co. v. Meaver, 54 Ill. 319; Mebster v. Steele, 75 Ill. 544, 546; Bartell v. Bauman, 12 Ill. App. 450; Metter v. Board of Trade, etc., 12 Ill. App. 607; Drake on Attachments, 5th ed., 451a.

By the statute quoted (Sec. 1, Ch. 62 of the Garnishment Act) it is clearly necessary that before process of garnishment on a judgment can legally issue there shall be a return of the execution issued on the judgment 'no property found'. In the present case the return on the execution, as shown by the record, is, 'No part satisfied'. May 26th, 1896.' This return may be, and doubtless is true, and yet the defendant in the execution may have had property more than sufficient to satisfy it. Clearly, it is not such a return as the statute prescribes, and is insufficient to warrant a judgment against appellant.

The Supreme Court has recognized that in garnishment against stockholders on a judgment against a corporation, the execution against the corporation must be returned 'no property found.' Coalfield Co. v. Peck, 98 III. 139, 142."

This opinion from which this court quotes was approved by the Appellate Court in the case of Antonio Mennella v. Michael Bottiglierq 191 Ill. App. 574. See also Ohicago Title & Trust Jo. v. La Porte Bldg. Corp. for use of Lalter Boland, Plaintiff in Error, and The First National Bank of Chicago, Garnishee, 274 Ill. App. 335.

For the reason that a return was not endorsed on the execution by the bailiff in accordance with the provisions of the

e A sai thing the resident of the distinct point of the material of the materi

in and the second of the secon

As the control of the

and the state of t

The supersul Lawrence of the supersult of the substitute of the su

TAÍS OFINÍAS TESS PRÍOS TRÍS PARET MARÍO E O CRESCOS TO TAS ARMÍSTAS DOMES ÉM VEL VE SE LA TRUBAIS MARÍO DE LA LAVIENTA LA TRIBANDA LA TRI

ent formalisary was laine to broke out failth diest of modificative

other questions have been raised, but in view of our conclusions as at ted, it will not be necessary to consider them.

The judgment is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

. The state of the

JOSEPHINE SLANSEK.

Appellee.

77

SLOVENSKA NARODNA PODPORNA JEDNOTA, (Slovene National Benefit Society), an Illinois Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

259 1.A. 617

MR. JUSTICE HEBEL DELIVERED THE COINTON OF THE COURT.

by the court for the plaintiff in the sum of 300. The action is a fourth class one, instituted in the Sunicipal Court of Chicago by the plaintiff to recover a death benefit alleged to be due her as the beneficiary named in defendant's certificate of membership issued by it to Frank Slansek, the late husband of the plaintiff. The suit is based upon the amount due from the defendant upon the death of Frank Slansek, as a passive member.

Upon the hearing the parties waived a jury and the cause was submitted to the court, and judgment was entered for the amount from which this appeal is taken.

The question before this court is whether the defendant society had the lawful right by its charter, by-laws and certificate issued to Frank Slansek and made payable to the plaintiff as beneficiary, to pay to the undertaker the amount due for services rendered, but not to exceed the sum of 250, and deduct such amount from the amount due the beneficiary under the terms of the certificate of membership.

The charter was issued on June 17, 1907, under an act providing for such organization, and its certificate of incorporation provides:

"4. The object for which this corporation is formed is to unite eligible persons of Slovene nationality and of sound mind, health and good moral character for their social, intellectual and moral welfare, and to provide death, funeral, sick ancident and disability benefits for

36

ENS. CH

Slavenc i minal im als Assissyl, an Alidacka is the contraction.

I THE SOLD STORM AND A STORM OF THE STORM OF

zara nečikom myri, siž modlovom od primosu sed menji zara neživim niž vimos nezivim stanovnoj žavom premosta od žetižindam gom prodovim skije novom stanovnoj komiterija.

The complict regions this course of the end of the end of a society had the limited miles of the end of the en

The Outlie number of Louis on Jose 19, 1509, mais: n set providing for each or white, no in this continue, not the provides:

46. The object for high this sequential is "tractical to entre with high rad at a cause with high rad of sound wind, broken yet yet and a relative sound wind, broken with the sound in the tracity death, investigated radions and the high resential for down it.

its members, which said benefits are to be paid from assessments to be levied and collected from its members as provided for in the by-laws of said society."

One of the by-laws of the defendant society provides for what is termed a passive member, and is in part as follows:

"Sec. 4. Members unable to pay their assessments on account of a strike or suspension of employment, may become passive members. Any such tember shall notify the Branch secretary of his intention to become a passive member in advance, and his passive membership shall begin with the following month, providing, however, that passive membership on account of a strike or out of work shall be allowed to the members residing in the immediate neighborhood only, and no suspicion has trisen as to the abuse of the privileges granted by this Section. \* \* \* The Society shall pay not more than \$250.00 death benefit for any passive member; in case he was insured for less than \$250.00, then only such amount shall be paid."

Article 27, Sec. 1 of the by-laws, which refers to the payment of funeral expenses, is as follows:

"Sec. 1. Upon the death of any member in good standing, as provided by the By-Laws, the Society shall pay from his death benefit a sum not less than \$5.00 and not to exceed \$250.00 for the funeral expenses. In no case shall more than the amount of the death benefit be paid. The secretary of the subordinate Branch shall file with the Supreme Secretary the death certificate, together with the undertaker's bill sworn to before a notary public, before payment of said sum shall be made."

## Section 2 provides:

"Sec. 2. Every local Branch shall arrange the funeral of its own member and bear its expenses. In case a member dies in the vicinity of another Branch, which is nearer than his own Branch, then such a Branch shall arrange the funeral and provide the necessary things, if the funeral is conducted with the S.M.F.J. rites, but the expenses of such Branch shall be paid by the Branch in which the deceased held his membership."

Plaintiff's husband in his lifetime was a member of the defendant society for many years prior to his death. The certificate issued to him by the Supreme Lodge of the defendant order provides the terms and conditions of Frank Slansek's membership. It is also subject, among other provisions, to any changes, additions or amendments to said charter or by-laws enacted subsequent to the issuence of the certificate of membership, and such by-laws shall control and be binding not alone upon the member but also upon the plaintiff

in ... in the state of the confidence of the state of the

, soldwar greinge i en iv var de al-Gege wat in med

the real of the result of the

#100.00 to 90 in a serie which is to the control of the control of

Article 17 . The Local Conference of the second and articles

prymont al function the area a follow:

es upperlikati bey to a dependence of the control o

## Lentleying Dankless

"ison i, .venny less i de mon in il non my the financi.

of its own member and herr is servant. The or servant disc in the value is servant.

disc in the visionity of the here i reach, which is not less was a fine of the here is a servant. I de the here in a servant is servant in control out with his servant is servant in control out with his servant out was about the control out with his servant of the manual in the control of the manual is servant. The control of the manual is servant.

elektriste bereite in the bit of the best of this beautiful to

A DESTRUCT OF THE CONTROL OF THE CONTROL TO CONTROL OF CONTROL TO CONTROL TO

beneficiary. This certificate also provides that -

"A sum not less than 5.00 and not to exceed 350.00 can be paid for his or her funeral expenses and deducted from the full amount."

The defendent society, notwithstanding the beneficiary's arrangement with the undertaker that the expense of the funeral should be 150, and the receipt of a letter from the plaintiff stating that she desired to have the money paid direct to her, paid the sum of 220.50 direct to the undertaker who, it is claimed, performed the services in preparing the body for burial, and thereafter mailed the balance of the amount allowed for such funeral expenses to the plaintiff by enclosing a check for 23.50, which she refused to accept and returned to the defendant society.

The plaintiff takes the position that the defendant society has no further or other power than that granted by the State, and that under the provisions of Ch. 73, Par. 488, Sec. 1, Ill. State Bar Stats. 1935, which is in part as follows:

"Section 1. A fraternal beneficiary society is hereby declared to be a corporation, society or association formed, organized or carried on for the sole benefit of its members and their beneficiaries, and not for profit. The payment of death benefits shall only be paid to the families, heirs, blood relations, ascending or descending wife, husband, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, step-father, step-mother, step-children, step-brother, step-sister, children by legal adoption, parents by legal adoption, affianced wife, or affianced husband of the member, a person or persons upon whom the member is dependent, a person or persons dependent upon the member, or to a trustee for the sole benefit of any person or persons within the above classes. Atthin the above restrictions each member shall have the right to designate his or her beneficiary or beneficiaries, and, from time to time have the same changed in accordance with the laws, rules and regulations of the society. \* \* \*\*

it is not provided that the defendant society has authority to direct that a fund be paid to the undertaker for services such as were rendered in the burial of plaintiff's late husband; that such provision does not come within the classes specified in the statute which are to be benefited; nor can the defendant society designate

one finitely. In the courties of the contract of the contract

In the case of a sale feether and entire and the color and decompanded for the case of a case of the c

decired to the control of the contro

 a beneficiary other than provided for by law, and if the statute under which a corporation is organized and its charter issued in pursuance of such statute, designates that the beneficiaries and members are confined to certain classes, the designation of one not of such class is void.

The contract between a benefit society and its members is contained in the certificate taken in connection with the constitution and by-laws of the organization and the statute of the State under which it is formed. Alexander, et al. v. Parker, 144 Ill. 355.

Fraternal beneficiery societies when organized under the laws of this State are controlled by the statutory provisions and have only such powers as are granted to such societies, and they may have such implied powers as are necessary to carry on the purposes of the organization.

The powers of the society under consideration were created by Oh. 73, Par. 488, Ill. State Bar Stats. 1935, which provides that payment of death benefits be made only to the class enumerated in the act. Under this act payment by the society of funeral expenses would have to be upon an implied power of the society to make the payment necessary for the burial of its member.

In the instant case the charter of the society provides that the object for which the corporation is formed is to unite eligible persons of Slovene nationality and to "provide death, funeral, sick, accident and disability benefits for its members, which said benefits are to be paid from assessments to be levied and collected from its members as provided for in the by-laws of said society."

In conformity with this provision, the society's by-laws were passed, and section 4 provides that if a member is unable to pay assessments on account of a strike or suspension of employment,

At the second of the second of

THE LOOK OF THE PROPERTY OF THE STATE OF THE

A LONG TO BE A CONTROL OF THE CONTROL OF THE PROPERTY OF THE PROPERTY OF THE CONTROL OF THE CONT

this property of the confirmation of the state of the confirmation of the confirmation

 he may become a passive member excused from payment of dues and assessments. And further, that the society "shall pay" not more than \$250 death benefit for any passive member, and it is upon this provision for the death benefit that payment to the plaintiff beneficiary is questioned by the defendant. The membership certificate issued to Frank Slansek provides for payment in these words:

"A sum not less than \$5.00 and not to exceed \$250 can be paid for his or her funeral expenses and deducted from the full amount."

Section 1 of the statute, which we have herein quoted, seems to be conclusive when we consider these words:

"The payment of death benefits shall only be paid to the

\* \* \* person or persons within the above (designated) classes."

of which the plaintiff is one.

The plaintiff desired to receive the amount due under the membership, in order to pay the funeral expenses of her late husband. These expenses she had arranged for and notified the defendant of this fact.

In support of its position the defendant relies upon Article 27, Sec. 1 of the By-laws, which provides that upon the death of the member in good standing the defendant is to pay the amount provided for in the membership certificate, less an amount not to exceed \$250 for funeral expenses. This provision does not qualify Section 4 of the by-laws, where the amount provided for is payable to the plaintiff beneficiary, and this payment is not restricted by any provision of the by-laws which would properly permit the defendant to deduct an amount from the sum provided for in the by-laws.

The conclusion we have reached is based upon the By-laws of the Society, and authorities are cited by both sides upon the question of the right of such society to provide for the burial of its members. The controverted question is whether the society had the right under the powers granted by the statute to provide by

is a property of the property of the control of the

್ರಾ ಕರ್ಷನ್ನು ಅವರ ಅವರ ಅವರ ನಿರ್ವಹಿಸಲಾಗಿ ಭಾರತಿಗೆ ಬೆಂಬರು ಹಿಂದು ಹಿಂದು

rain (12) men nu mon kin och moden den det kom blikken 1914bil 1 mail , kan och bet kolo och och und bet kom och god me **si glikeredess** ta gen und kom och bet kom och kom och och sessenne sossi , soch sääs

The rest of the letter of the colline of the colline of the second of the colline of the second of t

or I—gi tor non a familia tada er sama or neiselenes est.

sol a vas in adad go foria especiandar object in especiano but greein er sur lo la familia est. To meidener

the foregreen and mondon with this continue between the especiano est.

sol aprinte est auctoria with this continue between the estatement est.

go since of this continue est go forth estate entre entre estate entre estate.

its by-laws for the burial of its members and to deduct the amount expended therefor from the amount allowed the beneficiary. e are of the opinion that Bection 4 of the By-laws is in accord with the provisions of the statute above quoted, and that it was proper to provide that 250 death benefit be paid upon the death of a passive member of the society.

For the reasons stated, we think the trial court properly entered judgment for the amount set forth in this opinion for the plaintiff, and therefore the judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

And the second of the second o

38920

MARY HOOKS,

(Plaintiff) Appellant,

V .

PULLMAN PORTERS BENEFIT ASSOCIATION, OF AMERICA, INC.,

(Defendant) Appellee.

APPEAL FROM

37

MUNICIPAL COURT

OF CHICAGO.

289 I.A. 617

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered in the Municipal Court of Chicago for the defendant. The action was instituted in the Municipal Court by the plaintiff against the defendant to recover the proceeds due under a certain benefit certificate issued by the defendant, a fraternal benefit society, to one william S. Hooks, a member, and husband of the plaintiff.

The cause was submitted to the trial court upon a stipulation of facts, and a finding and judgment was entered in that court against the plaintiff and in favor of the defendant, from which this appeal is taken.

The stipulation of facts is substantially that the defendant is a fraternal benefit society and on February 24, 1932, issued Benefit Sertificate No. 5589 to William S. Hooks, member; that this member was at the time married to one Amelia Hooks and had a mother living, Emma A. Wilson; that the name of the beneficiary to whom the death benefit was to be paid was Amelia Hooks, wife of the named member, and the name of the alternative beneficiary to whom the death benefit was to be paid if first named beneficiary stated above did not survive the applicant was Emma A. Wilson.

It also appears from the stipulated fact that the first named beneficiary, Amelia Hooks, died on August 4, 1924; that the member, William S. Hooks, married the plaintiff in Chicago, Illinois, on February 24, 1928, and subsequently died on May 30, 1935, at Chicago, leaving surviving him his widow Mary Hooks, plaintiff, and

The second of the state of the second of the

in the second control of a cont

-p.it. In a temper injet with a contribut. In our part of the part of the contribut of the contribution of the contribution.

The object is not considered to an object the probability of the design of the second or the second of the second

Chieses, is via amerating at a day of the composition of the case of the case

his mother Emma A. "ilson, alternative beneficiery; that during the lifetime of the member illiam S. Hooks, no change of beneficiary was ever made by him, and therefore upon the death of the member, the defendant became liable to pay to the person properly entitled under said certificate the sum of 983.05; that at the time of his death he was living with his wife Mary Hooks, in Chicago, and his mother Emma A. Wilson was living in the City of New York and was not dependent on the member.

As a general proposition, we can agree with the plaintiff that the fundamental purpose of a fraternal benefit society is to furnish aid and assistance to its members, their families and dependents, and it is contended by plaintiff in this connection that the alternative beneficiary named in the certificate in the instant case was not a member of the insured's family within the meaning of the law of fraternal benefit insurance.

It is the general rule of law that the beneficiary who is living at the time of the death of the member of the fraternal insurance society is entitled to the amount payable upon his death, and this question is largely dependent upon the statute.

The Fraternal Beneficiary act of Illinois, Oh. 73, Pars.
488 to 510 (Illinois State Bar State, 1935), is controlling in the acts of the defendant as a fraternal benefit society, organized and doing business under the provisions of the act.

This act, among other things, provides that

"The payment of death benefits shall only be paid to the families, heirs, blood relations, ascending or descending wife, husband, father—in—law, mother—in—law, son—in—law, daughter—in—law, brother—in—law, sister—in—law, step—father, step—mother, step—children, step—brother, step—sister, children by legal adoption, parents by legal adoption, affianced wife, or affianced husband of the member, a person or persons upon whom the member is dependent, a person or persons dependent upon the member, or to a trustee for the sole benefit of any person or persons within the above classes. Within the above restrictions each member shall have the right to designate his or her beneficiary

The state of the s

This is a first of the contract of the contrac

this secretistics of the control of the choice who districtly well is the control of the control

The irsternal amostal by east indicate, 41. 75, 1002. 405 to 510 (filtenia 450 to 510 (filtenia 450 to 510 to 510

This rot, recommedite white a recolled were

"The ryname of decise are sites and the restablished sites, and the residence of the residence of the residence of the restablished of the restabl

or beneficiaries, and, from time to time have the same changed in accordance with the laws, rules and regulations of the society, \* \* \*\*

And so the question prises in this litigation whether the widow of the deceased is entitled to the amount payable under the provisions of the beneficiary certificate, where she was not designated subsequent to the death of the first wife, amelia Hooks, and therefore entitled to the amount due as against the alternative beneficiary, who is named in the certificate as East A. Wilson, the mother of the deceased member.

It is to be noted from the statutory provision above quoted that the member has the right to design to his or her beneficiary or beneficiaries, and from time to time have the same changed in accordance with the law, rules and regulations of the society.

This was not done by the member in his lifetime, and this provision is further amplified by the by-law of the defendant, which provides that

"Every member of the association in filing application for membership shall designate a person or persons was shall be the beneficiary or beneficiaries to whom payment of any death benefit is to be made in case of death of the member, and an alternative beneficiary or beneficiaries to whom payment of the death benefit is to be made in case the first named beneficiary or beneficiaries do not survive the member.

Such beneficiary or alternative beneficiary shall be confined to: wife of the member, his children, his parents, his brothers or sisters, other blood relatives or persons dependent upon him for support."

Therefore the beneficiary Emma . Wilson, the member's mother, who resides in New York, was properly named by the member at the time he became a member of the defendant society.

The theory of the plaintiff in this action is that a certificate of insurance in a fraternal benefit society is testamentary
in character and speaks as of the death of the member; that payment
of proceeds thereunder is governed by the status of the parties claiming at that time, and that Mary Hook, though not named in the certificate, occupies the status of the first named beneficiary, and is there-

od benedick skrag, dag dag mend dom til Ikk skrass mode sikk tom dom ng silan da somp di da da od 1990 dagistog som e

independent of the continuous continuous and continuous continuous

Is in the the second that it is a standard to second second section of the second seco

\*\* Propy as her all the saccination in thing a white them for an absorption is seen as a seed on the signified and the construction of the seed of the

Such osufficiery or user, it constitutes our is high configuration of his constant, it will be a six constituted to the state of his constant of the configuration of a first or constant when also for our constant of the configuration of the

Therefore the beneficiary Lame . This on, are constructive, the reserved with that resides in sew Yark, eas properly to the list he been notice and the best of the control of the control

 fore entitled to the amount provided for by the certificate, to the exclusion of the alternative beneficiary named in the certificate, because she did not reside with the member at the time of his death and was not dependent upon him.

which governs in cases of this kind, points to the case of Modern Woodmen v. Allin, 301 Ill. 119, where the court held that a provision in a benefit certificate which reads that the benefit fund shall "be paid at his (the member's) death to wife and children," without naming them, means that the fund shall be paid to such persons as answer the description of wife or children at the death of the member; and if the first wife dies and the member marries again, the second wife, in the absence of any express change of beneficiaries, is entitled to share in the benefit fund with deceased member's living children. It is to be noted from this opinion that the court in passing upon the question of the designation of the beneficiary said:

"Our attention has not been called to a decision of this or a similar question by any court of last resort. A few intermediate courts of appeal have passed on the question but their decisions are not in harmony. We are then left to decide the question from a consideration of the language of the certificate and of the object of benefit societies to afford protection to the families and dependents of members of such societies after the member's death. Expressed have classes, such as children, or wife and children, as was done, in this case. If instead of designation by classes they had been designated by their individual names they would take by that description if living at the death of the member."

It is unfortunate that the plaintiff was not designated by her late husband as one of the beneficiaries, or the beneficiary, to receive the amount due under the policy.

The Supreme Court in its opinion in the case of Modern woodmen v. Allin, 301 Ill. 119, held that where an individual is designated as the beneficiary, he would then be entitled upon the death of the member to the amount due under the certificate.

ios continue de la lace de la contra en la lace de lace de la lace de lace de lace de lace de la lace de lace de la lace de lace de lace de lace de la lace de la lace de l

Company for a distinct in dear live of a company of a com

this or a minimar on the new years of the set a drink of this or a minimar on the control of the car and of the

it is enfortered that the satisfic term of interest is a row mais area. The property is a row of interest to see a first the second of the sec

the House sourt is its relater in the one of grilly decided by the second of grilly decided to the second of the initial translations of the interestability, no or hid then it unitial upon bottom of the subtiliers when

The point stressed by the plaintiff is that the mother,

Image A. ilson, not being dependent upon the bounty of the member
in his lifetime, cannot under the terms of the statute r cover the
amount due. This of course without taking into consideration the
provisions of the statute and the by-laws under which a member may
designate a parent as a beneficiary.

Our conclusion that a member may designate a parent is based largely upon the construction of the by-law enumeration the classes within which the member may name his beneficiary, "or persons dependent upon (him) the member" for support. The language above quot d would indicate an alternative provision, that is, the member could name a beneficiary within the classes enumerated in the by-laws who was not dependent upon him for support.

This reasoning would apply to the instant case, and be believe under the construction outline, that william in Hooks made a proper designation when he named where it is its on the alternative beneficiary, in case of the death of Amelia wooks, his wife and first named beneficiary, to succeed to the amount due and payable upon his death, for the reason that he did not designate any other beneficiary in his lifetime.

For the reasons stated in this opinion, the judgment entered in the Municipal Court for the defendant is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P. J. AND ROSS O. HALL, J. CONCUR.

The pairs of the colors, and the colors of t

The continues of the desire the response of the sections of the section of the s

his green in the health of the settles of the settl

ed o drum that the footstance of months of the contract with the second of the contract of the

39000

NATIONAL BUILDERS BANK OF CHICAGO, Administrator of the Estate of Lottie Gold, Deceased, and ABE GOLD and PEARL GOLD,

(Plaintiffs) Appellees,

V.

A. A. SPRAGUE and BRITTON 1. BUDD, Receivers for Chicago Rapid Transit Company, a Corporation,

(Defendants) Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

289 IA 618

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is a suit instituted by the plaintiffs to recover damages for the alleged negligence of the defendants as receivers of the Chicago Rapid Transit Company, a corporation, in the operation of its elevated railroad. A single complaint was filed by three plaintiffs, alleging damages for personal injuries to two of the plaintiffs and for the alleged wrongful death of the intestate. Abe Gold and Pearl Gold sued for damages alleged to have been sustained by them individually, and National Builders Bank of Chicago sued as Administrator of the Estate of Lottic Gold, deceased. Three separate and distinct causes of action were stated in the one complaint, and three separate and distinct verdicts and judgments were returned and entered in favor of the plaintiffs, respectively.

The defendants were sued as receivers of the Chicago Rapid Transit Company, and answered the complaint and defended as such.

The three cases were tried together, the alleged causes of action arising out of one accident, which occurred at the intersection of Elmwood avenue and the tracks of the elevated Railroad in Berwyn.

Pearl Gold is Abe Gold's daughter, and Lottie Gold, plaintiff's intestate, was the wife of the Gold. The three of the named persons

Service .

Administrator of the set to of bottle Gelfs, decessed, not the

4 1

.... is bith it and entity, is busy receivers its Unicess Resid Francis Downing, a semperation,

ed to the later of his

A. .

1 1 cm 12 1 12 11

is. Baselys to all bolts of the all the contrast of the

designs for the cilest noull came of the recentrations received of
the Uniongs Truit around that my, a consist of in the order tim
of its elevated relivered. I charle consists may files by these
plointiffs, this ingues and the evenual injuries to ten of the
plointiffs and for the rais of areas ful derived to late ten of the
cold and pearl baid sund for demonstration of the recentrational
by them individually, and I therefore the read of this of them, and
administrator of the Est to of Lettic Gold, demonstration or apprint
and distinct example of datinct vertices on the tensor core returned on
three asparate on distinct vertices and independent one
cameric of the plaints, as succions core returned on

The differente rere auch to minetains of the Wildelo -anid

The force energy for topic bery the illess course of the standard of setting one of the setting one of the setting one of the setting of the

were riding in an automobile driven by abe Gold on September 25, 1934, and while crossing the Elevated Railroad tracks, where the train was being operated upon the surface of the ground, shortly after midnight, they were struck and injured by the train.

In this action no point is made upon the pleadings, except defendants' contention that the plaintiffs failed to establish the material allegations of the complaint.

Elmwood avenue at the place where the accident occurred runs north and south, and one block east of Elawood is Ridgeland avenue, also running north and south. Defendants! tracks cross Ridgeland and Elmwood avenues at right angles. There are two tracks, one each for eastbound and westbound traffic, and the power used to operate the train is electric. The electricity passes through a so-called third rail, and furnishes the power to operate the motor upon the motor car used to move the train. The first east and west street south of defendants tracks is 22nd street or Cermak road. Elmwood avenue has an over all width of 64.1 feet, and the paved portion is 29.2 feet. Defendants' right of way is 69.19 feet wide. On the south side of the right of way, running parallel therewith, is an alley 16.4 feet wide. Immediately north of and parallel with defendants right of way is another alley 17.5 feet wide. The two alleys and the right of way together are 103.09 feet wide. From the east curb line of Elawood avenue to the west curb line of Ridgeland avenue is 303.7 feet. There is no station at Elmwood avenue, but there is a station at Ridgeland avenue. Adjoining Elawood avenue and the defendants tracks and the alleys we have above described, are a number of buildings on both sides of the railroad right of way, which appear to be apartment buildings. There is also at the intersection of Elmwood Avenue and the tracks a signal tower with a crossing sign marked "Railroad Crossing", and also a sign of danger

energy services and the services of the energy of the ener

rums noise tel tantole, the labour broke it all as the labell in Harve to the red Tester fills and some ball filter. Electric of it courses: . A of and in the second which is a compact a beautiful and employed of the reast will be that the deficient of the language of the and - we expend the contribution of the contributi some Maca third rail, the familiar also pres at easy to be a transfer derwiger darie this told well with the out along of this two totals the design object south of initial the case in a wine after the company of an animal have a size our good again to habit life word in each transpe hacymin portion in Ad. 2 to the thing of the color of the second to the second t engineer with modification gradity on a fig. to the care and two series admost sets we Hite Indianes in the Chron of a lost . Johin Savi babl toles no si defendanted through of the throughter theny affile the value, the true. and may a which that the wild are applied on the the spirit and there exacts To the think the result depote their that all comments to consider the sail draw that Avenue is this a seems of the second of the ter eggent - . ni redukcija ...naret banderbir in well de s el egodf tas defendance lyras, promise or rainter or house that a constraint, even and the interpretation of the section of the section of the section of Mist at the trace and ballificat, indeed in the imag. -file to at house of other ord bar sames. Decarate le reitoes reserved to a term and the defend the server as a server reserved to the server and the server as a server as the server as a server as a

and a stop sign attached to this tower; also a danger light and crossing bell, and from an examination of certain photographs appearing as exhibits in the record, it appears that the construction of the third rail stops before it reaches the crosswalk and the street crossing.

The accident took place on September 25, 1934, shortly after midnight, about 12:20. The automobile was northbound and the train was westbound.

Abe Gold, one of the plaintiffs, testified that his daughter, Pearl, was working at the Walgreen Company located at Ridgeland and Twenty-second street; that on the evening of September 24th, or early morning of the 35th, he and his wife went in his car for her where she was employed; that when his daughter entered the car he was on Ridgeland avenue, north of 22nd street; that he turned on 22nd street and went west to Minwood, and then turned north on Elmwood. After turning on Elmwood there was a Ford car in front of him and a truck in front of that, both traveling north; that the truck and the other car passed over the tracks and when the plaintiff got there he slowed down, stopped and looked around, and did not see anything; that he looked to the east and west to see if there was anything coming, and then followed on, and when he was at about the middle of the track the train struck his car; that he was in second speed; that he did not see any lights and there was no whistle and no warning; that when he got to about the middle of the second track - westbound - he was hit; that he had passed this crossing before on Elmwood, and had seen the stop sign and the crossing sign, but was not sure whether he had ever noticed any red light on the post or danger sign; that he had never had occasion to look, because it was always clear and he went through; that when he first looked he was near the alley south of the railroad tracks: that he had not reached the first track; was about five or seven feet from it; that he looked east and could see all the way down to Ridgeland avenue.

The state of the s

The control of the co as see not governe to well to be notified to eligible to be fitted executions. geo ritt. I jeitas ovo log ta at (fortio pe bor—gimtos ber olofiejbi Tithi, or emiginemally of the lett, a roll if the result to he the beauty and investment in a first and a first transfer of the same wall of មិនស្រាស់ ១៩ ១៩៩៦ ខ្លាំង ១៥ និង ។ ១៦ ១៩២ ៤ ខ្លាំង ខ្លាំងស្រាស់។ ខ្លាំងប្រាស់ មិធីម៉ា ផល ខ្លាំង <mark>១៨០ ១៨</mark> and Administration of the grant of the control of the sent and the control of the End from themselves and the first and the form of the second Original in the court of the control troving to the mental period in the group of the first and the expension in the first of the fir which the a sent product. Mother all of the Merek and to sightings Market on the group with the group of the contract of the contract of the contract of Then to end to a like wint to the second of the transfer of the training of the - mailinguya sikidi samasa han ari - din iti in sa - dina aliaban - isani for the furtherman and the first the term of the same and secure a that has begind that you is the control of the belondard. There does not have the state of the s ស់ស្រែស្នា ជាក្នុង ស្រែស្នា ស he were mere than the color of the color will be a seen and id and tags sector grammars in the many pages and the property and provide and course in it is in the course of the contract the interest of the course.

and could see the station there; that at the time he completed his looking his car was not on the eastbound track; that he looked before he shifted when his car was about five feet away from the track; that he then shifted into second and started across; that when he got on the eastbound track he did not look but he was going; that all he did was to pay attention to his car, and he did not see what the truck ahead of him did: that before he got on the track he looked when he was five feet east of the eastbound track; that he did not look in either direction after that, and from there he did not look at all, and when he started up he only looked straight north; that he did not see any train at all; that when he got out of his automobile after the accident was about the first time he knew he was hit by a train; that at the time he crossed the eastbound track he was not going faster than 10 or 12 miles an hour, and when he was between the first and second track, only about 10 miles an hour; that the brakes on his car were good and that he could stop the car on a dime, and that he had driven a car for more than 12 years.

Plaintiff, Pearl Gold, testified substantially the same as her father. She testified that she was in the rear seat on the left-hand side, immediately behind her father, and her mother was in the rear seat on her right; that her father was in his position at the wheel; that she never noticed any warning signals on the crossing or where the warning signals were located, and had never heard of any before that night, and that none were ever rung or displayed when she had crossed at that place, and as far as she knew there were none there at that time. She further testified that they were traveling about 10 miles an hour as they approached the alley and slowed down and stopped just long enough to look around; that her father looked out and around, and she looked to the east; that she did not know whether her father looked to the east, but she saw him look around;

The property of the property o

Anno in cylindra delign of the second control of the second second form of the second control of the second second

that she could see Ridgeland avenue; that there was nothing to obstruct the view; that the night was dark; that she could seek the lights at the Ridgeland station and the street lights over the crossing at Ridgeland; that she did not see any train; that when they got on the eastbound track she looked again, but she saw no lights except at the station and the street lights at Ridgeland; that she did not look again thereafter and did not remember anything after crossing the first tracks until she found herself in the hospital; that she did not remember hearing any whistle; that she did not at any other time hear bells at that crossing, and in that accident her mother, Lottie Gold, was killed.

There is evidence of witnesses who testified that they were present on the night in question; that there was no danger signal as the train approached; that it was a clear night, and one of the witnesses testified that as he crossed the tracks he could see to the Ridgeland evenue station and that the lights were burning on the platform. There was other evidence to the effect that the only signal given was just at the time or prior to the accident, when the sound of a loud whistle was heard, and the crash followed.

On the question of lights on the train there is evidence by witness David R. Wandell, who testified he was on the train in the second coach; that just before the accident the lights ment out in the train, and that it traveled about 100 feet with the lights out before the impact. He further testified that as the train crossed Ridgeland avenue the lights went out, and as soon as they got across Ridgeland avenue the lights came on again, and remained on for about 50 feet, and then went off and stayed off.

The facts are in dispute, which is evident from the testimony of the witnesses who were heard at the time of the trial.

The defendants! position regarding the evidence is that

and the second of the second o

rear into dia consider and an entre view of policy of the interior of the inte

A president of a control of the state of the control of the contro

-100 và rat temi u setim e i deste join siò au une a primeri.

"Inima e rat de unit e reconsidere de la compania del compania de la compania del compania de la compania del la compania de la compania del la compa

the court not only at the close of the plaintiff's case, but also at the close of the hearing upon all the evidence, should have directed a verdict for the defendants.

The question is a close one as to the negligence of the defendants, and in order that the trial might be fair and orderly, the discussion of the attorney's at the close of the hearing of the evidence should have been upon the facts as they appeared in the record. It does appear, however, that counsel for the plaintiffs in arguing before the jury made several statements which were not justified by anything in the record. In the discussion of the facts counsel for the plaintiffs sought to introduce certain newspapers having some bearing upon the operation of these trains on the surface of the street crossings, and the advocacy by them of safety measures. Counsel for the defendants objected to the exhibition of these newspapers by counsel for the plaintiffs, and this objection was sustained by the court. Just what influence these publications would have upon the jury in arriving at a conclusion, is not made clear.

It also appears that counsel for the plaintiffs made this statement in his argument before the jury:

"One more thought about this contributory negligence, you know the court is going to give you a lot of instructions. Each instruction, you will recall, says, 'If you believe so and so to be the fact, then so and so is the law.' The lawyer for the defendants prepares whatever theory he has for his instruction and then the lawyer for the plaintiffs whatever theory he has and submits them to the court. The court only passes on whether or not the conclusions on the law are correct and if the facts are right. In this case the defendants gave 40 instructions and I have given 3 or 4."

To make this statement before the jury was clearly erroneous. It was in effect an effort to prejudice the jury against the defendants in this action. Calling attention to the fact that the defendants had given 40 instructions and the plaintiffs 3 or 4, was clearly in violation of the rule that the court is the author of the instructions when he directs the attention of the jury upon the questions contained in the instructions. If counsel would bear in mind that the instructions

The oliver of the contract of

delensable, the control of the contr

Is a feet total set the cut well and for the feet of the common one, it was also also total and the feet of the fe

are not counsel's instructions, but are given by the court to guide the jury as to the law upon the questions involved in the trial of the case, he would not make a statement such as was made in his argument to this jury. The court had not instructed the jury at the time, and of course there was nothing in the record which would indicate that the number given for each of the parties was known and in the record.

That is not all regarding this argument complained of by the defendants. When counsel stated in the presence of the jury and called attention to the fact that defendants had shedowed the witnesses on December 24, 1935, he admitted that this was marely his inference and not evidence in the case. Then why discuss it if it is not properly in the record for the purpose of proving the issues involved in this trial? Again, counsel for plaintiffs made this statement:

"I want you to remember when you get back to your place of business, when you think of this unfortunate woman, to think of these youngsters, ask yourselves the question, 'Have I done my duty to my fellowmen?' Heaven help your verdict, may it be mine. You may answer the question in the affirmative."

And then after making this statement, which was clearly an erroneous one, counsel concludes by saying:

"I want to thank you and ask you in the spirit of decency and in the spirit of the season and in the spirit of the holidays, gentlemen, to be fair to everybody concerned. Don't be carried away. \* \* \*\*

This was objected to and the objection was sustained by the court.

Of course both sides in the trial of a case are entitled to a fair hearing, and arguments of counsel should be based upon the facts as they appear in the record, but the hearing is never fair where counsel tries to influence the jury by statements tending to create passion or prejudice. In this case counsel should have restrained bimself in making an argument which might tend to influence the jury and prejudice the rights of the defendants. It is to be regretted that his argument for the plaintiffs was an appeal not

The company of the co

The last trace distribute and a first and

"I will you a minimumat this you will all the party phras of the province of the province of the standard of t

and taem safery multiply only the output of a secondary of the secondary o

This was cojected to the degleration of the section of the section

entition on the control of the contr

justified by the facts, and as it was clearly erroneous it will be necessary to reverse the judgment and remand the cause for further trial.

It also appears from the record that judgment was entered against the defendants, as individuals and not against the defendants as receivers to be paid in due course of their administration.

Attorneys for plaintiffs point to the Civil Practice Act Ch. 110. Sec. 220, Ill. State Bar State. 1935, which provides that in all appeals the reviewing court may, "in its discretion and on such terms as it deems just. \* \* \* order or permit the record to be amended by correcting errors or by adding matters which should have been included." Counsel for the defendants reply by stating that it was necessary for defendants to appeal in order to call to the attention of the Appellate Court the form of judgment which was entered. While it is true that the court may of its own motion direct that the record be amended to correct errors by adding matters that should have been included therein, the same right was given the plaintiffs in this case, but no motion was made, nor was an order entered in the trial court correcting the judgment by adding the words, "and that the same be paid by the receivers in due course of their administration." ... will assume that counsel for plaintiffs knew the law, and it was his duty to make a motion to correct the record.

In considering the facts as they appear in the record this court does not intend to create the impression of expressing an opinion as to the merits of the controversy.

For the reasons stated herein, the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

,

jestini i pravana i pravana i pravana pravana pravana pravana pravana je vila vila vena pravana pravana pravana

A PART OF THE STATE OF THE STAT

ab. 118, and file in a control of the control of th

. In which the control of the contro

en to the the single of the fairness for the total and the terms of the safe

Letter to the state of the

. The state of the

39097

BECCA ALEXANDER and JENNIE LEVI,
(Plaintiffs) Appellants,

V.

CHARLES H. STERN, et al.,
Defendants below,
CHARLES H. STERN and MAURICE S. STERN,
Individually and as Executors and as
Trustees under the last Will and
Testament of ESTHER STERN, deceased,

(Respondents) Appellees.

APPEAL FROM

SUPERIOR COURT

COCK COURTY.

200 T A 011

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The defendants moved the court to reconsider its ruling denying the motion of defendants to dismiss the appeal and to vecte the order denying said motion. In support of the motion the defendants show that the order or decree appealed from was entered on July 12, 1935, and notice of appeal was filed by the plaintiffs in the office of the clerk of the Superior Sourt on October 9, 1935, and a copy served on the defendants on October 14, 1935.

In the printed brief and argument of the defendants filed herein, the point is reised that the Appellate Court had no jurisdiction to entertain this appeal after the filing of the notice of appeal by the plaintiffs, which was filed in the office of the clerk on October 9, 1935, within the ninety days provided for by the Divil Practice Act. Ch. 110, Par. 204, Sec. 76, Sub-section (1), Ill. State Bar Sts. 1935.

The plaintiffs filed their petition for leave to appeal to this court on July 13, 1936, which was after the expiration of ninety days and within a period of one year from the date of the judgment, and the defendants, in support of their motion, contend that in the above entitled cause a judgment was entered for the defendants on July 13, 1935, and that the bill of complaint was dismissed by the court for want of equity. Further in support of their motion, the

Brook and the fire of the Apole

.

each to person in out 11 to grade 11 to

official and the control of the line of the last of th

The state of the s

The same terminal sector of the complete states and the same states and the same and the angles of the same terminal states and the same terminal sector of the same states and the same and the same states are same states and the same states and the same states are also satisfied and the same states are states are states and the same states are states are states and the same states are states are states are states and the same states are states and the same states are states are states and the same states are states are states and the same states are states are states are states are states are states and the same states are states a

In the adapted bails on the contract of the co

The control of the control of the state of the control of the cont

defendants call our attention to the case of <u>People ex rel Martha L.</u>

Bender Addx. Petitioners, v. Joe 4. Devis, Judge et al. Respondents,

Illinois Supreme Court December, 1936, Soc. No. 23662, wherein the court says:

"The right to appeal is absolute if exercised within ninety days from the rendition of the judgment decree or determination of the Trial Court. Therefore and within one year, the Appellant must show by affidavit that his appeal has merit, and that the delay was not due to his culpable negligence. But if an appellant files notice of appeal in the trial court within ninety days, he has taken his appeal \* \* \*. He has had the appeal the legislature intended him to have \* \* \*. There is nothing in the act authorizing a court of review to grant permission to an appellant to file its notice of appeal in the reviewing court after it had availed itself of the right within ninety days to file such notice of appeal in the trial court. When the original appeal was dismissed the suit was ended."

In the consideration of the defendants' motion it appears from the record that the plaintiffs filed a notice of appeal and proof of service in the trial court on October 9, 1935, and that by reason of the filing of this notice the appeal was taken, and this court is without jurisdiction to grant the appeal proyed for in plaintiffs' petition. The plaintiffs not having purfected their appeal after the filing of such notice, the original appeal was thereby ended and the court is without further jurisdiction to an at the plaintiff leave to appeal.

Therefore, the order granting the plaintiffs leave to appeal is vacated and set aside, together with the order of this court denying the motion of the defendants to dismiss the appeal for the reasons stated, and it is ordered that the defendants! motion to dismiss the appeal be allowed.

APPEAL DISMISSED.

DENIS E. SULLIVAN, P. J. AND HALL, J. CONCUR.

In the fermion on the teacher of all all most and the art of the continuence of the conti

nerth of the soliton laser to the the control was the control of the soliton to solve or the control of the control to solve or the soliton of the control o

I not only the series of a condex of a pair pair 1 differ that of the control of

. Alberta. . . . . .

DERING TO THE SECOND OF THE SECOND OF THE SECOND

38849

AGATHA JANUSZ,
Appellant,

V.

DR. LEWIS KENT EASTMAN, Appellee. 40

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

289 I.A. 618

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff, Agatha Janusz, seeks to reverse an order entered October 18, 1935, vacating the trial court's set prior order of September 16, 1935, which Z aside the judgment theretofore rendered against plaintiff July 5, 1934, and allowed plaintiff to file within twenty days her answer to defendant's special plea.

Plaintiff filed her second amended declaration May 4,

1935, charging defendant, a physician, with negligent treatment

of her ailments. May 16, 1935, defendant filed a plea of the

general issue and a special plea, alleging in substance that he

was a duly licensed physician and surgeon and regularly practiced

his profession in Chicago for a long time prior to attending

plaintiff; that the injuries and ailments of plaintiff mentioned

in her second amended declaration, which he was hired to treat,

were sustained by reason of plaintiff being struck by an automobile

being operated by the new may Home Lervice Corporation and one

Victor Buklewicz; that in his endeavor to cure and heal plaintiff

of said injuries and ailments he readered the professional services

alleged in her declaration; that plaintiff "made claim against"

the New Way Home Service Corporation and Buklewicz on account of

CONTRACTOR OF THE SECOND CONTRACTOR OF THE SEC

By this appose plants, gaths James, recks to revener on eader estructed and ergone prior order estructs. It was not be supposed prior order of entropy and supposed prior order of entropy and supposed applied to definite order of each order order. It also so definite or definite orders and the entry degree in a choose orders.

Pacino des and an action for second remarks deal and on the type of the call sent at the call of the call pace of the call of

her said injuries, charging said injuries were sustained by her as a result of the aforesaid automobile striking her; and that on June 16, 1931, she settled her claim against said New Way Home Service Corporation and Buklewicz for \$13,750 and gave them the following written release:

"Know All Men By These Presents, That for and in consideration of the sum of thirteen thousand seven hundred and fifty (\$13,750) to the undersigned in hand paid, receipt whereof is hereby acknowledged, I, Agatha Janusz, for myself, my heirs, executors and administrators, hereby forever release, acquit and discharge New Way Home Service Corporation, a corporation, its agents and servants, and Victor Buklewicz, his heirs, executors and administrators, and each of them, of and from any and all claims, demands, actions and rights of action of whatsoever nature and howsoever arising from the beginning of the world to the date hereof, which the undersigned now has or might have against said New Way Home Bervice Corporation, a corporation, and Victor Buklewicz, and each of them, and particularly, but not in limitation of the foregoing, of and from any and all claims, demands, actions and rights of action which the undersigned now has or might have against said New .ay Home Service Corporation, a corporation, its agents and servants and Victor Buklawicz, his heirs, executors and administrators, and each of them, resulting from an automobile accident occurring on or about the eighth day of February, 1930, at or near the intersection of Kostner avenue and Division Street. in the City of Chicago, County of Cook and State of Illinois "In Witness Whereof, I have hereunto set my hand and seal this 16th day of June, A. D. 1931.

her "Agatha X Janusz (Seal) Mark

Witness to Signature: James A. Tracy Address

C. Helmer Johnson, 130 N. Well St.
Address\*

Plaintiff's general and special demurrer to defendant's special plea was overruled June 8, 1935, and she was granted leave to file an answer to said special plea within fifteen days. July 5, 1935, plaintiff having failed to file an answer and electing to stand by her demurrer upon defendant's motion to dismiss, judgment was entered on the pleadings in his favor and against plaintiff. Thereafter August 2, 1935, Within the same term and also within thirty days from the entry of the judgment, plaintiff filed her verified petition in which she alleged substantially

how said injuries, obviouin, as id injuried for the subject in and the line of a subject of the subject of the subject of the subject in a subject i

-Direct til in: sof fedfig atmoosel ostell til med fil word! tytkit are ber kud met a smenodi mestalde ne ema edi ite melitete (213,750) to the wedereigned in head prid, received thereof is hereby acknowledged, I, Synthe Wommen, for equalify by india, Sen flinges, earsing t. Verelt yeares, a wedered a labor has unotations discherge her sew boas servio. Serp erstian, a corrossibilar, its agents and servents, and Vister Burl saion, bit inits, transcome and administrators, and erain of them, of the tree may and the claims, demands, a chicano end of the cover moture and however sufficient from the begin that of the cold to the detailment of the deta nadelY bes. . Hahamagmed of molumby objects to be was a mark will be a Haklewics, and seek of chem, and portioulerly but not the limit total of the forestain, of each is as each clara olaries, develoin, each can event til hir ne mer men here her her ble still ne tite te at det bue against suid dus ay Marc a avida dompon sinu, a carpon va agonts and nurvests and Thotax Rainburdon, No. hairs, and retains and similable trubers, and read of these, addition, France of the condition socident socurring on an electricity degree of literating, 2.06, at the control of the control of the control of account and the control of t in the Sity of History of Tornty of Took and Sate of Historia "in littles industry is bewere industry and the state and against the state of the

The second of all all make

0. Islamar Johnson, 188 ... 221 .t.

Pisiniff's Grows in sir distributed to a fell distributed to a Southenit's special piece and recovered of the Growth piece and recovered to a fell graded to a fell on the grant of the Growth piece and the graded to a fell on the graded to a fell of the fell

that by reason of the negligence and malpractice of defendant she suffered serious and permanent injuries, as a result of which she is now completely incapacitated physically and unable to leave her bed, and will remain bedridden for the rest of her life: that "several declarations and demurrers thereto were filed by plaintiff and defendant, respectively, and finally to the plaintiff's second amended declaration defendant files a special plea May 10, 1935." to which her wak former attorney did not file an answer after her demurrer to same had been overruled; that she was not advised of the order of June 8, overruling her demurrer to said special plea and of the judgment order of July 5, 1935; that she was physically unable to investigate the status of her case personally and that, although she repeatedly requested information as to same from her former attorney, she was unable to discover the true state of affairs; that she then advised her/former at orney that "she had never signed any release with regard to any claim for injuries which she suffered \* \* \* particularly she never signed any releases or release as set forth in the defundant's special plea;" that she "is able to sign her name in the Inglish language and has always been able to sign her signature either in the Polish script or the English script:" that "at no time has it ever been necessary for her to sign her name with the mark 'X';" that upon learning "the true state of affairs," she retained new attorneys in the place and steed of her former attorney and now desires leave to file her answer to said special plea of the defendant so that she may be afforded an opportunity to have this cause heard on its merits; and asked that the judgment against her of July 5, be vacated and that she be given leave to file her answer to defendant's special plea within twenty days.

-40011

offs fold to the control of the cont well expelled algebras in this play to be the league of the large we bed, and till remain beduite a wear the control of a million that and dof mount, propressively, and als it is the plaintful country . . . . . doels to blom entendend wilken in bede in a galent of he, lique, ted water meantained to the compact of the action of the sea capture were To besirbs for an . The sush abeliant we thee both same of removable a a arear of twice O, eventually have demonstrate to make appealant place 91 NO 6 TH 6 HO total ben vilamesting ower and in appears old complyante of olders Towns ableman, wile windering to disperse the contract the man unid never signed any relucate this a gray to a copy derivated weareles the benefit teven edentionionioned a # # Bereiter ode deidu or release our ast double in this eval about the careful E ago the one organifa ned link guar i i dalfije ikli bi bizan red maja of 🔝 🤎 wolf approvation and arms with a discrete for the self of the self sole" | minuse I steps told "(VIII sisses outs differ cases west agis o on the state of allowers and an analysis of the consequence of the place on the Tiend of her former absolute eat mor soutes. Letys be fille her graver echapitas ed you een tast o implessive out to selvice solly lelocge by

denis bedde the total and the best before after the extra the first that the contract of the sectors and the sectors are the sectors to the sectors are the sectors and the sectors are the se

Throng while sold Introductions to the

The same day, August 2, 1935, plaintiff's former attorney was granted leave to withdraw his appearance and the law firm of Meyer & Meyer was granted leave to file its appearance in her behalf. Plaintiff was allowed to file her motion, supported by the aforesaid petition, to vacate and set aside the judgment of July 5, 1935, and the hearing on said motion was continued to September 16, 1935.

September 16, 1935, an order was entered upon an exparte hearing vacating the judgment of July 5, 1935, and granting leave to plaintiff to file her answer to defendant's special plea within twenty days. On the following day, September 17, 1935, defendant moved to vacate the order of September 16, 1935, which motion the court ordered to be entered and continued until September 20, 1935. This last motion was heard October 18, 1935, and the court ordered that the order of September 16, 1935, vacating the judgment order of July 5, 1935, "be and the same is hereby vacated and set aside," thereby reviving the judgment in favor of defendant of the last mentioned date.

Plaintiff contends that the trial court had jurisdiction on September 16, 1935, to vacate the judgment previously entered against her and that its action in setting aside the order by which the judgment was vacated is not supported by the evidence. Defendant's theory is that the action of the trial court in setting aside the order of September 16, 1935, by which the judgment against plaintiff had been vacated, was proper and amply supported by the evidence; that the action of the court in entering the order of October 18, 1935, was discretionary and no abuse of its discretion is shown; and that plaintiff made no showing of facts sufficient to void defendant's special plea.

It is the established and practically universal rule that

The same dept, amont A, 1975, that a forward at communities granted and the forward of the or was granted file and the formal the formation of seven a file of the file and the file and the file and the file and file and

September 16, 1965, an erder that and erd party of the party for the party of the frequent of July 5, 1967, and granting force to be frainting to product the granting force to polariff to file her annuar to feel and anti-cutt special place within the polariff to file her annuar to feel and anti-cutt special the file and the court order of september 10, 1850, the party of the frequency of the file here is not on the file the court order of file the file of the court of the file the file of the file the file of the file of the file of the file of the file the file of the fi

Finite Is a server of the tendence the tendence and the fundadiotion on September 16, 1935, to receive the judynosat provider by a last her and that its rotion in a sain and the order by which the judgment was received in not anymorted by the evidence.

efondant's theory is that the sation of the reind cours in setting alide the order of teptember 1.1, 1935, by which the judgment against limitiff hed be a vected, was proper and capty subgrave of evidence; that the sation of the central in entering the order of the captenary and no chase of its order of sationary and no chase of its order of the captable.

to the education and proceed and relative and relations

an original tort feasor by the injured person, operates as a bar to another action for malpractice against the physician or surgeon who treated and is charged with aggravating the injury. (Adams v. DeYoe, 166 Atl. [N. J.] 485). In Guth v. Vaughan, 231 Ill. App. 143, the plaintiff was injured by being struck by an automobile operated by one Florsheim, and the defendant, Dr. Vaughan, treated the plaintiff for such injuries. Plaintiff settled her claim against Florsheim for \$225 and later brought an action against Dr. Vaughan to recover damages from him on account of his alleged negligence in treating her injuries. It was held that the settlement with Florsheim was a bar to the action against Dr. Vaughan. In the course of its exhaustive opinion in that case the court said at pp. 149-150:

"In <u>Pullman Palace Car Co. v. Bluhm</u>, 109 Ill. 20, where it was claimed by the plaintiff that one of his arms had been broken by reason of defective workmanship by the defendant in constructing and erecting a certain derrick, the court said, in considering the enhancement of damages as the result of malpractice, that if the plaintiff exercised ordinary care to keep the broken parts of the arm together and used ordinary care in the selection of surgeons and doctors and nurses, and employed those of ordinary skill and care in their profession, and yet, 'by some unskilful or negligent act of such nurses or doctors or surgeons, the parts became separated and a false joint was the result, appellant, (defendant) if responsible for the breaking of the arm, ought to answer for the injury in the false joint. And, further, the liability to mistakes in curing is incident to a broken arm, and where such mistakes occur (the injured party using ordinary care), the injury ensuing from such mistakes is properly regarded as part of the immediate and direct damages resulting from the breaking of the arm. Chicago City Ry. Co. v. Jaxby, 213 Ill. 274; Chicago City Ry. Co. v. Cooney, 196 Ill. 466; Variety Mfg. Co. v. Landaker, 227 Ill. 22; 26 Cyc. 1384. In the Landaker case, supra, the court sanctioned an instruction that contained the following: The law regards the injury resulting from the mistakes of the physician, or from the failure of the means employed to effect a cure, as a part of the immediate and direct damages flowing from the or . jinal injury. 6 Thompson on Negligence, sec. 7211; Furchase v. Seelye, 231 Mass. 434; Suelzer v. Carpenter, 183 Ind. 23.

"It follows, therefore, that, if there had been evidence that Florsheim was liable for the injury to the plaintiff, he would have been liable for the effects of the alleged malpractice of the defendant and that the release which was given to Florsheim would be a bar to the present suit by the plaintiff against the

defendant."

a settlement with and relowe of this signer to recover a when an original sort for sort of the interest of the formal sort of the section for national to extend the physical or or national who tracted and is charged with agreeous who tracted and is charged with agreeous with the child states of the physical sort of the section of the centre of the section of the s

"In inliment to be plaint in the term of his stan has been become a claimed by the plaint in the term of his stan has been become by the plaint in the term of his stan has been the constructing and erroring a case the extending the constructing the construction of the carmothest of the lambil of construction of the carmothest of the injury in the file burdeling of the carmothest of the injury encular that the carmothest of the carmothest of the injury encular that the carmothest of the carmothest of the injury encular the carmothest of the carmot

It follows, whencient, these, if there is a been cylicano that Florebein was likele for the the sujery to the plaints! , we will have been liable for the traces of the allegat makes obtain the distinction will defend the time the greatest makes were given to leminate walk was given to leminate walk a been to the greatest puts by the plaintiff a class the colemans.

tiff's special plea are true, such plea is an effectual bar to plaintiff's action. As heretofore shown, defendant averred in his special plea that the ailments and injuries for which he treated plaintiff were the ailments and injuries suffered and sustained by her as the result of being struck by the automobile operated by the New Way Home Service Corporation and Buklewicz; that she made a claim against said corporation and Buklewicz for damages on account of her said injuries; that she made a settlement of such claim with said corporation and Buklewicz for \$13,750; and that she gave them a written release of all claims and rights of action of every kind and nature which she had or might have against them, resulting from the automobile accident in question.

Meither in her verified petition filed in support of her motion to vacate the judgment, nor upon the hearing of defendant's motion to vacate the order setting aside the judgment, did plaintiff directly deny that she made the settlement alleged. On the other hand, attorney C. Helmer Johnson, who represented plaintiff, and attorney Abe R. Peterson, who represented the New Way Home Service Corporation and Buklewicz, both respected and reputable members of the Chicago bar, appeared before the court on the occasion of the hearing October 18, 1935, and stated that when plaintiff's action against the New Way Home Service Corporation and Buklewicz was reached for trial she settled her claim against said corporation and Buklewicz, the amount of the settlement was paid and she signed the release, a copy of which is included in defendant's special plea with her mark witnessed by attorneys James A. Tracy and C. Helmer Johnson.

But plaintiff insists that none of the witnesses was sworn at this hearing and therefore their evidence should be disregarded. Plaintiff prepared and had approved the report of proceedings of what took place at said hearing and incorporated same in the record filed herein. Inasmuch as it does not appear from said report of

If a supoid place for uniform and place in the following form of the first the country of the first and here and a support of the country of

Liel where in here versioning path sion of the standard of the motion to verses the judgment, more upon the he also of defendants motion to verse the case of a judgment, did plaintiff directly dray that the made the sevel sale of a judgment, did plaintiff is a freezely dray that the made the sevel sale represent of the other had not only the following the defendant following the defendant following the defendant the sevel sale representation and fluid endows the sevel sale of the case of the defendant of the object of the sevel sale of the object of the object of the object of the sevel of the object of the obj

a standing off them; is after the first part descended on the time.

thouseful remist of our years, .. nonne reparted to go become

 proceedings whether the witnesses were or were not sworn, it will have to be presumed that the hearing was properly conducted and that they were sworn. However, even though we assume that the witnesses were not sworn, no objection was offered to their testimony and plaintiff cannot now be heard to complain.

Defendant's special plea of settlement, convincingly established as it was, constitutes an absolute bar to plaintiff's action and it would have amounted to no more than an idle and futile gesture on the part of the court to have permitted the order vacating the judgment to stand.

For the reasons indicated herein the order of the Superior court of October 18, 1935, vacating the order of September 16, 1935, setting aside the judgment in favor of defendant is affirmed.

ORDER AFFIRMED.

Friend and Scanlan, JJ., concur-

Defending of a appear lefter of the obligation of planting planting and the including of the including and a specific of the second of the appearance of the

echnomic and the color of the c



38868

SYDNEY STEIN, Appellee,

V.

HARRY STEINER, Appellant.

41

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

289 I.A. 6184

MR. PRESIDING JUSTICE SULLIVAN PRLIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for \$4,200 entered against defendant, Harry Steiner, in an action tried by the court without a jury, brought by plaintiff, Lydney Stein, for commission claimed to be due him from defendant by reason of the sale by the latter of certain combination annuity and life insurance policies issued by the Equitable Life assurance Society of the United States to persons introduced by plaintiff to defendant.

This action was instituted september 2, 1931, and the pleadings at the time of the trial consisted of the common counts, a plea of the general issue and a special plea, and replication. No question is raised on the pleadings. The issues were further defined by plaintiff's amended affidavit of claim filed October 11, 1935, and by defendant's affidavit of merits filed October 14, 1935.

Plaintiff's amended affidavit of claim alleges "that plaintiff's claim is based upon an agreement between plaintiff and defendant entered into in to-wit, the month of spril, 1931, that defendant would pay to plaintiff one-half of any and all commissions received by defendant as a result of the sale or sales of annuity officies or bonds effected by defendant as a result of the introduction to defendant by plaintiff of any person or persons to whom such poli-

(@ :elEcagi

. III. II II. <mark>II</mark> . H

The definition of the content of the

This estimate the factor of the plant of the order of the plant of the plant of the plant of the plant of the order order of the order order

First stiff of the consider of a color of the elloped filet plants.

tiff of elets is bosed upon our case enterior claims. I the last the color of t

- Long Americans to the integral more marked was in the control of the

cies or bonds should be sold; that defendant sold certain annuity policies or bonds to certain persons as a result of an introduction by plaintiff. That there is due plaintiff from defendant, after allowing to him all just credits, deductions and set-offs, 44,200, together with interest thereon at the rate of 5 per cent per annum.

Defend unt's amended affidavit of merits averred "that he did not enter into any agreement with plaintiff to pay to the plaintiff one-half (1/2) of any and all commissions received by the defendant as a result of the sule or sales of annuity policies or bonds effected by defendant as a result of the introduction to defendant by plaintiff of any person or persons to whom such policies or bonds should be sold; that defendant did not sell certain annuaty policies or bonds to certain persons as a result of an introduction by plaintiff; that any introduction to defendant by plaintiff of any person or persons to whom such policies or bonds were sold was not the proximate cause of the sale of such policies or bonds; that the plaintiff was not the procuring cause of the sale of such policies or bonds; that if any agreement as alleged by plaintiff had ever existed between the purties to mil cause, it was thereafter and prior to any sale of such policies or bonds, mutually rescinded and abrogated by the oral agreement of the said parties on or about the 11th day of May, 1931; the during the month of May, 1931, and prior to the sale by defendant of certain alleged combination amounty and life insurance policies in connection with which the plaintiff claims his alleged commissions, the plaintiff acted adversely to the defendant and was guilty of bac faith to the defendant in connection with said transactions, and endeavored to prevent the sale by defendant of said alleged combination annuity and life insurance policies; \* \* #. #

It is undisputed that plaintiff introduced one George Bates

TO BE THE STATE OF THE STATE OF THE STATE OF THE STATE OF STATE OF THE STATE OF THE

and table to the year daily to below the business at the bestern only of the an indial Island and the first and the state of the figure of the first state of monitors and simple als we go in (CAL) also-one This minute unicidas gaimas in sei este se alem ade la cimpe a an incidencia de di to posteriorist this he sale as a raise of the go better the about to mulas roma in its est animar par in mise quan be illibrately god dischied to rionem illo arminitation il 120 auto 1120 auto 1120 auto 1120 auto 1120 auto 1220 auto L. In all some a nervey all dir of Aned to problem the te . . . Ha is was a feet of the control of a land to the interior tail to be into the first the first of the control of th this is the transplantaness of the form and itsien of their feels and their bug. A.A. of the resolvent of the first of and the A. Solder, Howe To Find e in colling and all regulations and a first cover and Tilitalising vid enaction of the property of the contraction of the months of the action of the same of the bar about the in-⇔cunaços sei de 1 11 a, rem migrali o dil tam glima y amica sirmo baye il and proposed and appelled by sphere builded and define did will be on the street for the contract of the state of the street tur e mar a caun mà fair a mai le adus, mac dui lendar la carte a c nuth bare. Ann 1995 of the sense of the selection of the selection of the complete of the more than the selection of the sele

". h pasioilng community will m

e that egyten' als I am ortal litter ing their hotas from

to defendant on May 11, 1931, that defendant sold to Bates, his mother and his sister certain annuity and insurance policies of the Equitable Life Assurance Society of the United States (hereinafter for convenience referred to as the Equitable) on May 29, 1931, and that defendent received (8,400 commission by reason of said sales. The evidence, however, was in sharp conflict as to the nature and terms of the alleged commission agreement between the parties and as to the alleged abrogation of said agreement. It is not substantially disputed that after the date of the alleged agreement between the parties and prior to the sale of the policies by defendant, Stein did outer into an agreement with an agency of another insurance company, under which he was to receive a commission in excess of that which he claims he is entitled to receive from Steiner. in the event that such other agency rather than Steiner sold the policies to the members of the Bates family; and that in pursuance of information furnished by plaintiff to such other a ency, the latter endeavored to sell somewhat similar policies to the said members of the Bates family in competition with defendant.

Defendant contends that he promised to take care of plaintiff only in the event that Stein sold policies to some of his
clients; that Stein's adverse activities constituted bed faith
and disloyalty, and that when information thereof came to him
May 11, 1931, he repudiated with plaintiff's consent any arrangement which the parties theretofore had with reference to commission;
and that solely through his own efforts, and despite plaintiff's
adverse activities, he sold the policies to the Bates family.

Plaintiff's theory is that he was a mere middleman and not either an agent or broker and that after he had introduced the "customer" to defendant he owed no duty of any kind to Steiner; and that there was no evidence in the record of adverse activities

term Aur

The control of the co

waliniki (Karrik British karrik arrika karrika karrika da karrika da karrika karrika karrika karrika karrika k

. . . . epulabb dale solalbogmes ai

tiff only is the vest it of the relation policies of the call like alignment of the call like alignment shad be a call to a call of the ca

who is notice to be all a sold on the wastered to determ the resided work that the sold of the body and the collection of the sold that the thirt that all a sold on the sold of the sold that the sold of the sol

on his part or to support plaintiff's contention that another insurance agency sought to sell insurance to the Bates family as a result of information furnished by him.

The trial court predicated its finding and judgment solely on the question that the agreement between the parties contemplated the payment of the commission claimed on the basis alone of the introduction of the purchaser by plaintiff to defendant, and, such introduction having been shown, plaintiff was entitled to recover.

Regardless of whether plaintiff was to receive as his share of defendant's commission on the sale of the policies in question one-half or a "split", or whether defendant was to take care of plaintiff, the conclusion is inescapable that plaintiff was to receive commission only in the event that he "would procure or assist in procuring the sale" of the policies.

April 30, 1931, the first day he met defendant, Stein exacted a promise from Steiner that he would not attempt to contact Bates, the prospective purchaser, before he (.tein) would even give him Bates's name. Under the admitted arrangement of the parties, defendant was precluded from seeing or talking to Botes until what Stein considered was the opportune time. It was not until May 11, 1931, that plaintiff brought Bates to defendant's office and introduced him. In the meantime, from the day he first met derend nt, plaintiff, according to his o n testimony, spent an average of about an hour a day for the succeeding seven or eight days with steiner, assiduously applying simself to learn from him the advantages and outstanding features of the particular policy so that Stein might the better present its merits to Bates. From time to time plaintiff reported to teiner the progress he was making with Bates. During this period tein assumed the exclusive duty of interesting Bates in the purchase of policies for himself

entition is the construction of the limit of the construction of t

nest the one can be a subject to the control of the canonical order orde

And the second of the second o

particles of the president of the control of the co

and members of his family, and on May .7, 1931, he secured from defendent an Maitable policy for 100,000 on Bates for presentation to the prospect so that he might examine its terms. Plaintiff returned this policy a day or two later with the statement that he did not think he could sell the quitable policy to Bates, and upon being asked why, merely said "I just won't be able to close them." Up to this point ...tein had not introduced Bates to Steiner and he had himself personally assumed the entire responsibility of making the sale. Itsin's conduct thus far certainly does not bear out his contention that his sole obligation under the agreement was to introduce Bates to defendant in order to earn his commission. But plaintiff's ardor in defendant's behalf had perceptibly cooled. Belore introducing Bates to Steiner, Stein had contacted Warsh & McLennan, another insurance agency, which offered him a larger commission if Bates purchased policies of a similar nature issued by the Penn Mutual Life insurance Company, which such other agency represented. Plaintifi even told defendant that he thought it would be useless to bring Bates in to meet him [Steiner], but when plaintiff was acvised that, if he did not bring Bates in, defendant would go and see him, Stein finally consented to "bring himin." as heretofore stated, plaintiff introduced Bates to defendant on May 11, 1931, but immediately before doing so hid taken him to the caline of Wersh & McLennan. Plaintif, told defendant later the come day that he had been over to Warsh & McLennan's office to "see them" about submitting Jenn Mutual Life policies to Bates. Stein testified, in effect, that defendant protested against his contact in this regard and "raised his voice a bit". Defendant testified as to this occurrence that he not only protested against plaintiff's inimical conduct but insisted that "if I sell the Equitable contracts, you are not going to get any pay from me of any kind" and

grant to a none the straight, we will be a like to all the architecture of the second and the second and the second and the second and the second architecture of the second and the second and the second architecture of the second and the second architecture of the endanastron no encla rede laborationi El rola equallació discrementarionic with selection of a control of a control of the control of the control of with the first of the form office time and files before it thinks done with warfe or all of aless dead, at 60 - all the ember he was paired acqui maniet es autri les montent de la compensaria del compensaria della compensaria dell to weighting our site of a season of the original the site of the midding this solders to this use the transfer of retail, that the livery of the course with the contract of an angle of action of the course this .vofoco s Ediin er as bed Tileicë stou hi . I shi wolub ul'Illianinis teë Politikada, detofulti ikkeril uga erevinga feldh niferre e jiya e jarnure - Barn Johnson or Chaire and College College Modern College Co gare, no protên divos (b) ( , go vom o perunghas ( 200 Shaka) embla edê yê Mire all of policy of the man believe the arms of the first of the fir පා.. එම සාක්ෂ පෙත් ද් නත් මේක් ුනත් මේක් නත් කියලා බව ක්ව වෙරුවී ඉඩවන් මේ සායම්මයන පේ this or the long that the bid con the critical tenders as a wint ecualida i Magaballi all'isforca andronamen quil illa miléa catal ana ome om form of early (A institution of the contract o VI CALLER OFFICE CONTROL OF BUILDING A SECURIOR AND A CONTROL OF FRANCE CONTROL OF THE CONTROL O wisters mit for and for in lighter out . I have in a straited imige smode Tion), in alloct, thete are not not and as a large of the first terms of the second contract of the second contrac or the late of the Ar. Tell and id a process will be also have despite of the to this essentiant the near plant probable of the near this term is the second of the -med Ad Jims out iles a tim this lotsion; ted tembers Isolaini from the bill rear on the more work way and done of the control was greater that

that Stein answered, "that is all right, because you can't sell the Equitable contracts; I am with Bates and I am going to sell him Penn Mutual contracts."

Defendant testified that between May 11, 1931, and May 29, 1931, when Bates purchased the equitable policies from him on his lawyer's advice, he neither saw nor spoke to stein. As to whether he had met or talked to defendent between May 11, 1931, and May 29, 1931, Stein's recollection was decidedly hazy. The defendant also testified that prior to May 11, 1931, plaintiff had not told him that Bates was going to examine policies of a similar nature of other companies or that he [Stein] was going to make commission arrangements with other insurence agencies.

of all the evidence in the record that the construction placed by plaintiff himself on his agreement with defendant for commissions, from its very inception, refutes his claim that he agreed the right to share in defendant's commission merely by introducing Bates to Steiner. Then he did introduce Bates to defend at he accompanied his introduction with the statement that he was a hopeless prospect and could not be sold. Prior to that time stein had exclusively undertaken the task of procuring the sale and it is idle to urge now that his sole function under the agreement was merely as a middleman to introduce Bates to Steiner.

Plaintiff's contention in this regard is further refuted by
the theory advanced in his original affidavit of claim, wherein it
is averaed that "plaintiff's claim is based upon an agreement by
defendant to pay plaintiff a commission of \$4,200 if plaintiff would
procure or assist in procuring the sale of a certain canuity cond."

Thile plaintiff's original affidavit of claim, as well as his amended
affidavit of claim, was verified by one of his attorneys, that fact
does not detract from the force of the admission contained therein

and the second country and a second country and a second construction of the second country and a second country a

As a series of the distribution of the control of t

of wil the evidence in this record wit to this constitution can a final of the off will the evidence in this record with this constitution. The constitution of the co

Explication of the semberation is the regard in 1 the second in the strong of or interview in the strong of compared in the contribution of the second of the strong of th

in procuring the sale of the policies. This affidavit of claim surely was not filed until after consultation between plaintiff and his attorney and Stein must be presumed to know the contents of it. There was no showing or offer to show that the original affidavit was inadvertently or mistakenly drawn and it is fair to assume that it more truly portrays the agreement of the parties than the amended affidavit of claim filed four years later.

After plaintiff's intensive initial effort over a period of more than a week to personally sell the policies to Bates, his attitude changed and he not only did not offer any further assistance toward procuring the sale for defendant, but the evidence is convincing that his efforts thereafter were bent on depriving Steiner of such sale.

Plaintiff's insistence that he was merely a middleman, and, as such, had no other duty to perform to earn his commission than to bring about the introduction of Bates to teiner comes ith poor grace, and his position in this respect is untenable. In Muling Case Law, vol. 4, p. 330, it is said: "A broker is simply a middleman, within the meaning of this exception, when he has no duty to perform but to bring the parties together, leaving them to negotiate and come to an agreement themselves without any aid from him. If he takes, or contracts to take, any part in the negotiations, however, he cannot be regarded as a more middleman, no matter how alight a part it may be." To the same effect are Jenson v. Bowen, 37 N. D. 352, 164 N. J. 4; Clouton v. Meeves, 24 Idaho 293, 123
Pac. 907; Stapp v. Godfrey, 158 Ia. 376, 139 N. J. 893. These cases hold that the status of a middleman exists only where one, not having undertaken to act as agent for either party, or to

,

to lang. The constant of them of the first of the learning weather a common of the first of the

Finish 13 to trace of the reason of the second of the seco

exercise for either his skill, knowledge or influence, merely brings them together to deal for chemselves, he standing indifferent between them; and that if he assists either party in effecting or negotiating the trade, or if he takes any part in the negotiations, however all ht, and even though he may do so without any prior agreement so to do, he becomes a partisan agent and cannot be considered a middleman.

Plaintiff did not stand indifferent between Steiner and Bates. For the eight or nine days immediately following April 30, 1931, when he first met ateiner, plaintiff actively negotiated in defendant's behalf to sell the policy to Bates, but, thereafter, for the reasons already stated, his efforts appear to have been directed to frustrating defendant in his efforts to close the insurance contracts with the said Bates. In our opinion, the evidence does not show that plaintiff's status was that of a middleman and it was incumbent upon him to prove that it was, not only at the inception of the transaction but throughout its entire course.

(Jenson v. Bowen, supra.)

what you will, from the moment Stein became interested with defendant in the sale of the Equitable policies to Bates he owed his principal, steiner, the duty of loyalty and good faith, and he was prohibited under the law from acquiring rights in the sale of the policies antagonistic to defendant, with whose interests he had become associated. In passing upon a somewhat analagous situation in Lavis v. Hamlin, 108 Ill. 39, the court said at pp. 48-49:

"The subject is not comprehended within any such narrowness of view as is presented on appellant's part. In applying the rule, it is the nature of the relation which is to be regarded, and not the designation of the one filling the relation. Of this principle Bispham says: 'The rule under discussion applies not only to persons standing in a direct fiduciary r 1 tion towards others,

THE SECOND SECON

Astro Di Comina in Congresso di Congresso di Congresso de Congresso de

the control of the co

Christer we disculate the print of the second of the second of the second expectation and the second expectation of the se

a to m. o. in the same than the state of the same of t

such as trustees, executors, attorneys and agents, but also to those who occupy any position out of which a simil r duty outht, in equity and good morals, to arise. (Bispham's Equity, sec. 93.) \* \* \* The rule we apply, as to its broadness in extent, is aptly expressed in the merican note to Kecch v. andford, 1 Lead. Cases in Eq. 53, as follows: 'Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagoni. tic to the person with whose interests he has become associated. \*\*

In <u>Hafner v. Herron</u>, 165 Ill. 242, in discussing the question of bad faith on the part of an agent or broker to his principal, the court held at p. 247:

"But it is well settled, that if an agent or broker is employed to transact a particular piece of business, and in the transaction is guilty of bad faith to his principal, he thereby forfeits his commissions. (harton on Law of Agency, sec. 336.)

\* \* \* In the application of this rule it makes no difference whether the result of the agent's conduct is injurious to the principal or not; in such case, the misconduct of the agent affects the contract from considerations of public policy rather than of injury to the principal. (It matters not, that there was no fraud meant, and no injury done. The rule is not intended to be remedial of actual group, but preventive of the possibility of it. (Young v. Hughes, 32 N. J. Eq. 372.)

The finding of the trial court, in our opinion, was not only against the manifest weight of the evidence, but was predicated upon a misconception of the law applicable to the facts in this case. We are impelled to hold that under his agreement with defendant plaintiff was required to procure or assist in procuring the sale of the policies, that the agreement was mutually rescinded May 11, 1931, when plaintiff first apprised defendant of his commission arrangement with the other insurance agency, and that in any event plaintiff by his adverse activities, but forfeited any right that he may otherwise have had to share in defendant's commission.

For the reasons indicated herein the judgment of the uperior court is reversed.

REVERSED .

Therefore, it is a second that it is a second that the second is a second to the second of the secon

est pai martir al prest esi, e il pappag ev grajeg ev Life di unio il e viut, e ur le viut, esi no sivi i e di la melvassa Life e i il la cump e ur le life e il cump e usv alsoinius

The state of the second of the state of the second state of the se

The sincilar of the coling of the coling of the colong of the states of the since of the colong of t

so har so was no durang high acts of turbal budge from the control had been

o Hersawit all I have

38907

PAUL C. LORBER, CHARLES E. FOX and ALBUIT W. SWAYNE, as trustees of the Leight Trust, Appellees,

V.

14 WEST RIM STREET BUILDING CORPORATION, a corporation, CHICAGO TITLE & TRUST COMPANY, as trustee, PERM MUTUAL LIFE INSURANCE COMPANY, a corporation, and E. A. PECK, as trustee,

Appellants.

42

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

269 I.A. 6191

MR. PRESIDING JUSTICE CULTIVAL DELIVERED THE OPINION OF THE COURT.

Plaintiffs, Paul C. Loeber, Charles H. Fox and lbert W. Swayne, as trustees of the Leight Trust, filed a bill of complaint May 16, 1933, to for close their lien for 76,013.01, with interest from January 5, 1931, on account of interest coupons o ned by them which were originally attached to bonds of an issue in the principal aggregate amount of 875,000, executed by the in treet wilding Corporation and a cured by its trust deed of May 5. 1927, conveying to the Mic o Mile & Trust Company as trustee the property at 14 .. . In street, Thick to. Except as to certain issues decided on the plandings, the chuce was referred to a mester in chancery, the recommended that the bill be dismissed for ment of equity. The chanceller sunt ined plaint fist exceptions to the master's report and entered a decree March 2, 1936, finding that plaintiffs were entitled to a lien for 14,405.28 with interest from Jenuary 5, 1931 (being 10% of the smount el imen) and directing a sale of the property in default of the payment thereef. From this decree defendent: appeal. Plaintiffs filed a

e Aleres

17

(c) The first of the control of t

နည်းသည်။ မိုင်းသည်။ မိန်းသည်။ မိန

The same of the contract of the same of th

The first state of the control of the state of the control of the

whereon. Them this took that the the less this will added to

notice of cross-appeal because said decree allowed only 40% of their lien claim instead of the full amount thereof.

Plaintiffs' complaint alleges that Lecember 5, 1927, the Elm Street Building Corporation issued bonds aggregating \$875,000, with interest coupons attached, payable at the office of Leight & Company, Chicago, and to secure said bonds and coupons it executed its trust deed to the Chicago Title & Trust Company as trustee (copy of trust deed attached to complaint as exhibit "A" and made a part thereof); that plaintiffs are the owners of certain interest coupons detached from the bonds of said issue, all of which interest coupons matured on and prior to December 5, 1929; that February 27, 1930, the Chicago Title & Trust Company, trustee under said trust deed, exhibited its bill of complaint in the Circuit court of Cook county in case No. B-196773, entitled Chicaro Title & Trust Company as trustee v. Elm Street Building Corporation et al., for the foreclosure of the lien of said trust deed; that such proceedings were had in that cause that March 14, 1931, a decree of foreclosure was entered therein finding that the Chicago Title A Trust Company as trustee had a lien for its own ben fit of \$55,388.50 and for the benefit of the owners of unpaid bonds and interest coupons (exclusive of the interest coupons owned by plaintiffs) of 971,011.08; that in said decree Leight & Company, as the owner of the interest coupons heretofore referred to, was found to have a lien of 36,013.21, with interest from January 5, 1931, which lien was found to be subject and subordinate to the lien of the Chicago Title & Trust Company, in its own behalf, and on behalf of the owners of bonds and interest coupons other than those owned by Leight & Company.

plaintiffs' complaint then set out verbatim paragraph 61

of said decree, wherein it is ordered and adjudged that defendant

Wim Street Building Corporation pay to Chicago Title & Trust Company

as trustee \$55,388.50 for its own benefit and \$971,011.08 for the

holis of arose-chart is and sold to are talent and and the colors of the

Assess states on a second seco

as beaster had a lieu for the out the of Thyline of Thyline of the other the beat the of the office of the other of the other office of the other ot

As signing the self-of two too held indulgance faithfullent

benefit of the holders of unpaid bonds and interest coupons with interest thereon as aforesaid, and that, unless said alm Street Muilding Corporation or some one for it or one or more of the defendants should make said payments within five days, together with the costs of suit and master's fees taxed at \$4,843.35, the mortgaged property described therein or so much thereof as may be sufficient to realize the amounts so found due as aforesaid with interest and costs, etc., be sold by the master.

It is further alleged that Leight & Company did not file any pleading in said couse praying for the foreclosure of the trust deed for the amount due it on account of its interest coupons and that the decree did not order payment of the amount due Leight & Company on account of the interest coupons held by it and did not direct any sale in the event of the nonpayment thereof; that the premises were sold by the master and a certificate of sale issued May 6, 1932; that by mesne conveyance the equity of redemption in said real estate became vested in the 14 West Blm Street Building Corporation, which redeemed from said sale June 14, 1952; that by virtue of said conveyance and redemption the title to said premises became and is vested in the 14 west Wim Street Building Corporation and the lien of the aforesaid trust deed as security for the interest coupons formerly owned by Leight & Company and now owned by plaintiffs has been reinstated and constitutes a first and paramount lien on the premises; that the rights of all other persons are subordinate and that there is due plaintiffs \$36,013.21 on account of said interest coupons and interest thereon from January 5, 1931, as found by said decree; and that the aforesaid trust deed provides inter alia:

"So long as said defaulted bonds or interest coupons remain unpaid, said Leight & empany, as such helder of such defaulted bonds or interest coupons, may assert and enforce (but subject to the continuing prior lien of this Trust Deed as to all other unpaid bonds or coupons) all the rights, privileges and remedies given by this trust deed or by law, to the owners or holders of such defaulted bonds or interest coupons, including the right to cause this trust

#\$1. Purchase and remained the quality of the second to the second dispersion of the restrict of the restrict

ರಕ್ಷಣ ಕರ್ಮ ತಿರ್ದಿ ಭಾರತಭಾರತ ಪ್ರತಿಯೊಂದಿ ಕೆಗುಳು ಆ ಭ್ರಕ್ಷಣೆಗೆ ಅಥವಿ ತಿರ್ಮಿ arm to the companies out was published and by the perfect of the contract of t has proques \$ ... Sai off to imposes no si sub ameters sit met hosh And the cores did not county payment of the cores of the cores. con the the the right works of the participation of the the contract ode douis the stand demonstration and the character of the standard demonstration promiser vers cold by the mailter as a servicion to excession mi makign der he gilinge end som germen smen gil tædi ;2881 48 god gribilian gasaga end dan li aga ki segana turbea matas fost bies Corporation, which redeemed show said to Je June la, 1928; that by virtue of call conveyance and not that on the fills to make grandeen roltmanger in the tip 14 . Tm . that the state of the state of the state of and the lien of the forestid truck deed to security for the interest soupone formerly owned by I. i his a dompany can no somed by plantmost amnounted has destil a assubitioned has bedesign mood and office on the premiser; that the rights of all other passens and caboring to and that there is two plaintiffs did, blo. on the one of order internd namel to these is greated and the raid decreased ban energine d. tak Dy would used toug been Jesus sincerous said taid bac treuted bies

To long as said defended bonds of interest deal cas remain that said long as remain or said long and for another than or said long and case on the deal of the deal of the deal of the deal of the said long and said the said long are coupons) the the said the coupon of the deal of the said long the deal of the

deed to be foreclosed in accordance with its terms, and said premises to be sold for the payment and satisfaction of such defaulted bonds or interest coupons \* \* \* The rights and privileges given to said Leight & Company by the provisions of this article, or in any other part of this trust deed, shall inure to the benefit of its successors and assisms. \* \* \*

"All rights of action under this Trust Deed or under any bonds or coupons secured hereby may be enforced by the Trustee or Leight & Company, in its discretion. \* \* \*\*

It is also alleged that the balance of the indebtedness due under the trust deed has been fully paid, that the amount due plaintiffs is the only outstanding indebtedness thereunder and that the rights of the Penn Mutual Life Insurance Company as the owner of the mort-gage indebtedness of \$120,000 secured by the trust deed executed April 15, 1932, on the premises involved are subordinate to plaintiffs' rights.

The answer and the various amendments thereto filed by defendent 14 sest Elm Street Building Corporation were adopted by each of the other defendants and may be treated as the joint and several answers of all the defendants. Defendant's answer to the bill of complaint admits substantially all matters of fact therein set forth, but denies that plaintiffs have any lien or right to foreclose for the reason that the trust deed in question and all indebtedness thereby secured, including the interest coupons owned by Leight & Company, was fully and completely foreclosed in said former foreclosure suit No. B-196773; that by the decree of foreclosure and sale entered therein it was the intention of the court to order and direct, and said decree when properly construed does order and direct, the sale of the mortgaged premises for the satisfaction of all the several amounts in said decree found to be due and owing to the several persons therein found to be entitled to liens against said premises, including the amount of \$36,013.21 found due to Leight & Company as the owners of the interest coupons now sought to be foreclosed.

The state of the s

Type, where we have noted and the field of the field of the field of fills of the management of the management of the fills of the fill

nga sugain no no dio diametro del polín y les sub mediades com THE HARLEST AND SECRET THE PROPERTY OF A SECRET PRO sell of the the Mit Mindre . Ant. There's only file to drow the forey a lambo for 3 more to receive the relation of of the state of th forealous for the suprem this who wasted to a 'm recolon was thi indebtodness threathy arounds, including the light of a contract of a co file al completed indicate but talking to temperate and indicated -utfor 10 . Telegraphy of the 12-40-40-40 and first ordered for the ATERO WE TO DO LO SEE WAS A WAS LAW SEEN SEED BURGES OFFICE DESCRIPTION OF umple frame trace of some a size acres to bine, from cococide some medium of Hollow the reference of the control stion of all the sever I escentic in all the deal last to be deal es autologica del qualitara del curato traccologi lavroya esto as guileo be Discisson in the control of the cont

The second second second second second

A THE REST OF THE REST OF THE PARTY.

By an amendment filed herein July 26, 1933, the foreclosure decree in case So. B-196773 was incorporated in its entirety in defendants answer. nother smendment to the answer was filed December 12, 1933, which evers substantially that Leight & Company, plaintiffs' predecessor in interest, was the so-called house of issue for said \$875,000 of bonds and sold them to the public, and that such bonds with their attached interest coupons thereby came into the hands of various persons; that the office of Leight & Company was designated in said bonds and coupons as the place where the coupons were to be presented for payment; that when the interest coupons now sought to be foreclosed became due they were duly presented for payment at the office of Leight & Company by the various owners thereof, who were paid the face amount of their respective coupons, which were surrendered to and taken up by Leight & Company as in the ordinary course of its business; that neither the mortgagor nor any one for it furnished to Laight & Company the money used by it for payment of such interest coupens, but that the mortgagor was then in default in that it had failed to deposit with Leight & Company the moneys required for payment of said interest coupons, and the moneys so used were the moneys of Leight & Company and were paid and used by it \*without informing soid respective owners and holders of such coupons of the fact that said mortgagor had so defaulted or of the fact that the moneys so being paid were the moneys of Leight & Company, or that Leight & Company intended to hold said coupons so surrendered to it uncancelled and claim ownership thereon and the lien thereunder upon the mortgage security, or of any fact or thing calculated to advise or put said owners and holders upon notice that Leight & Company then and thereby intended to exercise any right to purchase as id coupons, or intended by payment of said moneys to said ccupon colders to do or eccomplish anything other or more than payThe state of the s

est generates and the first transferent that the the late of the analysis and the established and the state of the analysis of the established and the control of the established and the

and compone were to be given about a car a gradule; which this independent ⇔อบ กูร์สิตภาภสามาธุรณ์ แมว วิสายาณ กระกดียตาดโปนที่ยชื่อที่ถู่บน กระด owners thereof is a check of the description of the state graph, at the interpolation of the contract of nd the property of the result of the best of the best times and the it for payment of might incurrent erroom. I have also see the corticus and when he did not be to the continue of the thirty of the the continue of De arracyt magaired for the following the first part of the array and the first of the Lo sur Jeffeld team of mile sylvengers bit is infinite all should be distributed by is the last as expured but once they noted by appace will built built as ou anagant (1) a hiller on me and all appropriate off 1 it to all to all -At the tests we live a compute suc bolik encour wi of become के सहावता की दें एक्टकेंट्र के राजवादी केंद्र अंग का राज्य केंद्र के जो जो करा o the minor magnets. In this extension about any no out whe of water the in the livery continues of the special property of the continues of the special in the continues of the cont The more was also be discovered by the control of t erperorublica des la confide organizació Egyptopu (no pélet

ment of the interest so due; and this estendent further says that said holders and owners of said soupons had, nor had any of them. any such knowledge or notice at the time of receiving the moneys so purporting to be offered in payment of interest; " that the coupons now sought to be foreslosed were therefore fully paid and discharged and the lien thereof under the terms of said trust deed was terminated and released at the time of the respective maturities of said coupons; that plaintiffs participated and co-operated in the plan of reorganization of the mortgaged property formulated by the committee of bondholders, which plan did not provide for or contemplate the making of any payment or allo once of ony lien on account of seid interest coupons then comed by plaintiffs but did contemplate that through the operation of said plan the bondholders would become owners of said mortgig a property, subject only to the lien of the new mortgage of \$120,000 to be made and negotiated as a part of said plan; that plaintiffs, by their co-oper ton and puticipation in the reorganisation plan, induced oppositately so, of the boadholders to join in said plan and surrender their superior rights; that the redemption, by virtue of which plaintiff rlain that their subordinate lien was elevated to a prior position, was made as a part of said plan, and that even if plaintiffe did in I et have a lien upon the mortgrad real estate by virue or paying and taking up the interest coupons in the manner described, and even if such lien was not berred and foreclosed by the proceedings had in the former foreclosure case to. B-196773, novertheless plaintiffs are entopped by their sott and conduct from now ascrting any such lien against the said real estate, which is equitably the property of said bondholders.

A further amendment to defendants' answer was filed June 8, 1934, thich set forth in full a written memorandum of agreement executed May 7, 1931, by the attorneys for plaintiffs and the

total open in the conference of the are perfect from the ends to discusand the second transfer that a second the fitting of the second the second beautiful to the second the second transfer that the second transfer the second transfer that th The second of th ್ ಕರ್ಷ್ ಫ್ರಾರ್ಟ್ ಫ್ರೆಫ್ ಫ್ರಾಂಕ್ ಸರ್ಕಾರ್ ಸರ್ಕ್ ಸರ್ಕಿಸ್ ಸ್ಟ್ರಾಸ್ ಫ್ರೈಸ್ಟ್ ಸ್ಟ್ರಾಸ್ ಪ್ರಾಥಿಸಿ ಕಾರ್ಟ್ ಮುಖ್ಯಾಸ್ ಪಾಟ್ನ್ ರಾಸ The strength of the control of the strength of the strength of the strength of By Control of the Springer Control of the State Control of the State Control of the State Control ారు. వ్యవారం నాగ్రామంలో కార్యం కార్యాలు కార్యంలోని ఎంటేగా ఉన్నారు. కారికిందు కేంద్రా అందే. ఆట్లు ఉన్నాయి. and the desirence of the medical control of the state of the District of the restriction of the restriction of the section of the section of the sector of th - part to the control text a major (10) is the story at the control to the control terms. వారా గాలకే. గాలా కాగా కారాగా ఈ కొమ్దా గారా కుక్కుక్కారు. కూడా కూడా గాలోపో ఈ కాంటేవే అంచేగుచ్చుంతుంది. the state of the first of the property of the definition of the first of the following of the first of the fi າ ໃດໃໝ່ໄດ້ ທີ່ ທີ່, ໄດ້ ຄາວໃນ ຕົວເປັນ ຄົວເປັນ ໜ້າຫລັດ<mark>ເພື່ອຫລັດ ເພື່ອການ ເພື່ອການ ເພື່ອການ ເພື່ອການ ເພື່ອການ ເ</mark>ພື່ອການ ເພື່ອການ ເພື The second county of the secon Lion of the section of the state of the stat mit the solution of the control of t to the first the the second of the first of the first of the first of This agency of the first of the contract of the solid profession of a set a

The first open in the first and the control of the control of the first and the first and the control of the co

The first of a second of the s

Bondholders protective Committee, which agreement previded for the co-operation of said parties in the matter of the promotetion, submission to wondholders and carrying out of plane of reorganization of the various properties covered by bond issues which height a Company had sold to the public.

Plaintiffs and defendants agree that the decree of foreclosure entered in the instant case ordering the sale of the premises involved to catisfy plaintiffs! lien to the extent of 40% of their claim is erroneous, and declare that much because can only be reconciled with the theory that the trial court endeavored to compromise the is ues on the basis of the written memorandum of the attorneys for the parties of May 7, 1931, which provided that where the plan of reorganization contemplates only one class of securities to be issued to all interests" the par value of plaintiffs' subordinated interest coupons "shall be scaled down to 40% of said par value and securities of the same class issued to other bondholders and on the same basis will be issued to the Leight trustees, equivalent to such scaled down value. The theory of the court was clearly erroneous in that if such written memorandum was effective and binding between the parties, it converted any right to a lien which plaintiffs may have had by virtue of their subordinated interest coupons into a right merely to participate benefically in the stock of the new corporation formed pursuent to the 14 West alm street reorganization plan on the basis of 40% of the interest they would be entitled to receive had their coupons not been subordinate. No alternative right to a lien to the extent of 40% of their interest coupons or in any other amount was preserved to the Leight trustees in this instrument and it necess rily follows that no such right can be predicated upon it.

in the evidence and will be referred to later, the facts in this

pa | 40

in the first of the control of the c ingr f er volgt gre pu b represent unione å had had bild bytoledd bidd was the first paragraph and the control from the second to self the first and the the control of the co The process of a confusive of the first of the set them two reliant prompty of this to the bushes this and In is entry may and taken ates r arm a lating to the work work of the color . The transfer of the constraints to the the transfer and the constraints ...t.. iida di laa ay ayaasay jiila ah ayaasay waa iyaan ah led and the contract master and analysis of the contract and contract that continue to water Time in melo mail and injuryes - w. I for real control and the control program thereof is better the unii dii aa e aa in iladada ka kadi wali uli maasa dawab wil dwali With Mark to address on the district of the state of the wind the to be and a nest of median of the trust on all of . . Admir All in the server of the second and the energies that all its Into the control of the colored the second of a feet all and second rai mong britani eme me men definir

ith a victored on a victory only and a victory of the contract of the contract

proceeding are uncontroverted, and, as stipulated by the parties before the mater, appear in substantially the Followin, chronological order:

In 1927 Leight & Company, a corporation, had its office in Chicago and was angaged in the business of underwriting and selling various issues of securities to the public. It sold 1,508 bonds issued under date of May 5, 1927, in the aggregate amount of \$275,000, executed by the Elm street Building Corporation for the purpose of constructing a large apartment hotel building on the property at 14 West Elm street, Chicago. This bond issue was secured by a trust deed of said property by the Elm Street Building forporation to Chicago Title & Trust Company as trustee. Under the terms of the bonds and interest coupons and the trust deed securing them, such bonds and interest coupons were payable at the office of Leight & Company and there were provisions in the trust deed to the effect that if the mortgager should default in furnishing the money for the payment of the bonds and interest coupons shen one, then that:

"Leight & Company may at maturity or at any time within sixty (60) days after such default pay out of its incividual funds to the holder or holders of such defaulted bonos or coupons the amount due thereon, and such bonds or interest coupons shall thereupon be deemed to have been purchased by said Leight a Company, and such bonds or interest coupons shall be delivered uncanceled to Leight & Company, and shall become and be the property of said Leight & Company. The payment for such esfoulted bonds or interest coupons as aforesaid by said Leight & Company shall not be considered a voluntary payment by it for the benefit of the party of the first part or for the benefit of any of the other holders of bonds or interest coupons recured thereby, and shell not have the effect to pay or retire the said bonds or interest coupons so purchased by it, nor to impair the security given by this Trust Deed for the payment thereof, except as hereinafter provided but shall vest sold leight & Company with all the rights, liens and privileges (except as here nafter provided) given to or conferred upon the former owners or holders of such defaulted bonds or interest coupons."

Further provisions of the trust deed gave Leight & Company, in the event it advanced the money for such defaulted bonds or interest coupons, the right to elect within ninety days as to

notively the soft of dealing has to give effect any order and the guidest comp -character and collect of collect have been all temperatures. With second

Addition of the first of the control of the control of the control of the first of the control o

Parther provide ion of the true of the first of the first of the parther of the p

whether it would held them on a parity with other bonds, and in the event it did not so sleet then the bonds or coupons so asquired were to be held by it as subordinate to all other bonds and interest coupons of the issue. The mortgagor, The Street Building Corporation, failed to provide sufficient funds for payment of the interest coupons which metured June 5, 1928, Hecember 5, 1928, June 5, 1929, and December 5, 1929, and Leight & Company, on or about the dates of the several maturities of said interest coupons, took the interest coupons now sought to be foreclosed in over its counter in the ordinary course of business in the same manner as though it were paying the interest then due as evidenced by such coupons, but used its own money for such payments without advising the various holders of the respective coupons that the mortgagor had defaulted and that it was paying its own money and acquiring ownership of the coupons in the manner provided in the trust deed. So far as the helders of the compons knew or were advised Leight & Company was merely paying the mortgagor's money out for interest.

Pebruary 27, 1950, by reason of the mortgagor's various defaults, the Chicago Title & Trust Company, trustee under the trust deed, filed its complaint in the circuit court in case Sc. B-196773 for the foreclosure thereof and made Leight & Company a party defendant under the style "unknown owner". It was duly served with process. In that proceeding Leight & Company produced and placed in evidence the interest coupons which it had acquired, as heretofore shown, but did not file any pleading in that cause which proceeded to a decree of foreclosure entered March 14, 1931. Frior to the entry of the decree in case No. B-196773 Leight & Company was in process of liquidation and plaintiffs herein as trustees under a trust agreement dated December 23, 1950, forming the Leight trust, acquired the assets of that company, including the coupons now sought

and there entered the first a marketing in the country to the contract the marketing of regiopes al inogeo to lessa dis med da les pas cal bis di ress ទី២២០០វីស្តី ម៉ានេះ តាមានជា ១៤៩៤០ ន៍ហុន ១០ ១៩២០១ ១០៩៩០០ ២០ ៤៤ ក្រុមី **៤៣១៨ ១៩ ១០** ១**៤១៩** failed to provide weal Solemo thanes for payment of the intermed coupons which subject from 1, 1872, security to 250.8, For the T, I to , end Josenher B, 1989, and Isight ' Campage, an or seems the define of tik jak : kogsop (potpski birs To weitingiss i ser i se the set outcomes against the medical substance and substance for the ಾಗಿತ್ತು ರೇ. ದೈವರ್ತರ . ಇಗ್ರಮಗಳು ಸಾಕ್ಷಣ ರಾಗಿ ದೇ ರಾ**ರ್ಯಕ್ರದ ಹಿಂಗಳು ಇಗ್ರಮ**ಿ . Loss and the first on making of modernial and and routh the test and gainged musifies are that the children isonth; sincerese, ficus were were ati and the second Cook of the Arms of the second secon The Lord in the state of the state of the property of the state of the to seed too all to make of the deads and all bedivers teamer and al t sempons hnew or well netwished Enthies a confernation in themaly posting The second second second second second

Handron Floolistic in in the neuron At . 2018 Les Limings I

deed, Filled its complaint in the almostic arms in the forest its company a protegy of the forest the forestant of the male made included a respective a protegy of the file of the file of the control of the control of the file of the

sequence the sales of the species and retirement

to be foreclosed and any rights based thereon under said decree. A committee for the protection of the holders of lirst mortgage bonds sold through Leight & Company had also been formed and was active in connection with various defaulted bond issues, including the issue here in question occurred by the property at 14 lest im street.

The Leight trustees had possession of the records Termerly owned by Leight & Company relative to the various bond issues sold by it, including the respective lists of bondholders, and were active in the reorganization of the properties covered by seid bond issues. Their interest and activity are manifested by the written memorandum of agreement, heretofore referred to, executed by the attorneys for the said beight trustees and the Bondholders Protective Committee May 7, 1931. This memorandum contains recitels as to the desirability of co-operation between the parties in the matter of reorganizations and in formulating and working out the plans therefor. It provides "that in all instances plans will be sent out with the joint approval of the Leight trustees and the committee and that there shall be an indication in connection therewith whether the plan originates with the Leight trustees or the committee. Except for this indication as to the origin of the plan and the joint letter with reference therete, the whole plan is to be handled under the direction of the originating party, whether the Leight trustees or committee, until the whole matter is completed. " It also provides as to reorganization plans promulgated by the committee that "it is agreed that in such a case the committee shall receive 75% of such reorganization fee and the Leight trust 35%, " that "where the plan of reorganization contemplates only one class of securities to be issued to all interests the par value of plaintiffs' subordinated interest coupons "shall be scaled down to 40% of said par value and

to lead and the common of the common the common of the com

Tille. Si terroe in sau ilo em man log ins de estabris defini offi by it, including the respective liet of chicological, at word achive in the reorganisation of the projection orvinal by all bost . Will talk the back think one will be a teamful what . . teach nd of the care and the farment, is an according to the contract of the bird ny bendronan'i Africa no banka na mandayana dakahen bahan edi mel syesmodda Opening the control of the control o To redden will be no let a the most action of one to to the state of -casalit tradiquaté tra risli es bror privation de bro bro privation de la companie de la companie de la compa it's function of a flat as the area of his file at touch software flat to 5. A farm cutching and two applaint filling ent to foregoe thick out unio terforio della mandia nollanamena ante nollo diberi ese ed Eleda 1 = 0 < 20 cor this indiction on to the origin of the plan and the join: Loss or ાં છે. જે જોઇ જોઇ કર્યું કેટલ માં કર્યું છે. જે તેમ છે. જે જોઈ જોઈ જોઈ જોઈ જોઈ જોઈ જો છે. જે જો જો direction of the originating party of the chief the true to a committee, until the choic matter is completed in the case graviets at the train and have tall yet bed givening analy modernthmy you et Harr to the time such a case the condition whill a stiff of the record ation fee and the Medgh's saust Toph to the t there for Isa ಗು ಕರ್ಮಕ್ರಿಯ ರಾಜರಾಭ್ಯಕ್ಷಕ್ಕಾರ ರಾಜ್ಯ ರಾಜ್ಯ ರಾಜ್ಯ ರಾಜ್ಯ ರೀಪ್ರಾ ಕರ್ಣ ಕರ್ಷ ಕರ್ in the sale interports the party age of the initial interpolation int reat compone "timal he conted fount to of on a litter value and

securities of the same class issued to other bondholders and on the same basis will be issued to the Leight trustees equivalent to such scaled down value; and that where the plan of reorgant-zation calls for a "continuing committee or trustees \* \* \* the Managing Trustee of the Leight Trust" is to be a member of such committee or one of such trustees. No sale was had pursuant to the foreclosure decree entered in case No. B-196773 until May 6, 1932, over a year subsequent to the entry of that decree. In the meanwhile the Bondholders Protective Committee had formulated a proposed plan of reorganization of the property, which in typewritten form was transmitted by the attorneys for said committee to Paul C. Loeber, the managing trustee of the Leight trust, by letter dated April 8, 1932. The letter, for which Loeber receipted, requested his approval of the plan submittee.

The only conflict as to the facts arises at this point. Mrs. Cleveland, an attorney in the office of the attorneys for the committee, who wrote the letter to Loeber, testified that after she had sent the proposed plan to him she telephoned him and he told her that he did not have time to so over the plan personally, but that he would send Mr. Tegtmeier, an attorney in his office, to discuss said plan with her and that anything Togtmeier did in the matter was satisfactory to him [Loeber]; that Tegtmeier came to her office, and, after some discussion, stated that the plan was acceptable and agreed that the approval of the Leight trust be printed on same; and that she thereupon arranged for the printing of the plan as finally drafted with the approval of the Leight trust thereon. Tegineder testified that he went to Mrs. Cleveland's office, discussed the plan with her at Loeber's direction and made certain objections to it, but that he told her that he would have to report back to Loeber; that he never at any time

The control of the co

the only consists to the transfer administration who exists well tolk months, and to coldine this it manusta me . SmelovelD . will ಾರ್ಟ್ 19ಕ್ಕೇ ಕರ್ಮಾನಿ ಸೀವಿಸಿ ಮಾರ್ಕ್ನಲ್ಲಿ ಅದಿ ಇದ್ದಾರೆ. ಅದೆ ಇದು ಕರ್ಮ ಅರ್ಥಿಗಳು ಅಧಿಕ್ರಾಣ ಅಮ್ಮೇ ಕಾರತ್ ಕೆಟ್ಟಾಯ ಅ ind some the proposed plant to him the first present bins and but the data entil course outs with more constants even ten bib out family unit the business of the Teptonoisty on a construction of the off the bile welcount a palidonar date one worldlis and bles sessonio of some maintaged bodd affording sold or amobelation are median her cilico, and, within norse disquestion, according that the ក្សី ដីការក្រៅ ប៉ូណីក្រៀបថា នេះថៃ (Jo. A. Youngga នល័ន និងនៅថា កែពុកាក្រ និការក នុ**រី**ពិធីវិយុធិត្តិក្នុង paid the second in land to favorage out dita her and allied as using out in -early find on the off period printers and represent the collection of the mollocate stradeol de son dals maig ond basamente collie e'b . dertain objections to it, but thet he that he that sufficient a mapped basis tradeout of many freques of event by approved the plan in the name of Loeber or the Leight trust; and that "Mr. Loeber did not even authorize me to approve the plan in his name. He said, 'go over and find out what it is about and report back and say nothing. "

The four page printed plan was mailed to the bondholders by the bondholders committee on April 13, 1932. At the end of the plan appeared the approval of the Bondholders Protective committee by its chairman, Adolph Kempner, and beneath it the approval of the Leight Trust as contained in the following printed addendum:

"Leight Trust, 111 est ashington Street, Chicago, Ill.

The Leight Trustees approve the plan of reorganization above set forth and recommend the immediate deposit of the First Mortgage Bonds with the above named Depositaries.

Paul C. Loeber;

Managing Trustee.

On the same date a copy of such printed plan was mailed to the Leight Trust, which appeared on the list of bondholders. pril 23, 1932, a follow-up letter to the bondholders was drafted by Mrs. Cleveland for the bondholders committee and a copy sent to Lesber, enclosed with the following letter:

"We are sending out a follow-up letter on the 14 West IIm Street matter, as we desire to have as many bonds deposited as can be before the sale, which is to be held on May 6th. Please sign a duplicate copy of this letter as a receipt for the letter to the holders of non-deposited First Mortgage Terial 6 1/2 Toold Bonds of the Im Street Building Corporation, dated spril 33, 1932."

The follow-up letter bore the approval of the Leight trustees in same the manner and form as did the printed reorganization plan. It does not appear that Loeber objected to either of these letters to the bondholders bearing said printed indorsements on behalf of the Leight Trust, but on the contrary the Leight trustees permitted the plan of reorganization to be carried out without protesting that the use of their name was unauthorized. They actively participated in the consummation of the plan by receiving a check from the new

the paint of the pile seat of the anti-order of the continuation o

The Team page rainter of a constant of a constant of the case of the case of the page of t

helsing out of the soft of beat diese to the state of the favorage

Tall the same of t

noid miningroum to stake add siverals trained tolable off:

#real tell to also it districts belong to severe and fixed belong the books and the college of t

"we are conding one or caller-up littin on the li out "le."
-treet matter, see of delive as in to the till tellor or oul ten und
-treet matter, which is to or inclination of the allower which
to duplicate copy of this letter as the treet, at the little to the
-the core of hour approited librate orthour which the tends

The follow-up latter hare the epartria of the thin true of the term of the series of the partrial of the properties of the properties of the properties of the continual that the har object of the continual terms of the continual terms of the terms of the continual of the terms of the continual terms of the terms of terms of the terms of the terms of the terms of terms of the terms of terms of

corporation, the 14 West Elm Street Building Corporation, formed pursuant to the plan, in the sum of 14,375 in payment of the item "Leight Trust expense allocated to this building" as set forth in Exhibit "A" of the printed plan, and Loeber, the managing trustee of the Leight Trust, accepted office as one of the trustees under the trust agreement to hold the capital stock of the 14 West Elm Street Building Corporation, as provided in said plan.

The plan was comprised in a four-page printed letter on the letterhead of the Bondholders Protective Committee dated April 12, 1932, advising the bondholders that the committee had formulated a feasible plan for reorganization of the property at 14 West Elm street. It recited the fact that a foreclosure suit had theretofore been instituted and a final decree entered therein. and proposed as a plan of reorganization that a new building corporation be organized to which the equity in the land would be conveyed, and that the new corporation would issue its entire capital stock to three trustees under a form of trust agreement substantially like the trust agreement adopted by the committee in other Leight Company reorganizations; that "the Trustees will issue to each holder of unsubordinated first mortgage bonds who has deposited his bonds with the committee within the time hereinafter specified, a trust certificate representing a beneficial interest in one share of stock in the new corporation for each \$10 in par value of unsubordinated bonds and coupons deposited with the committee by such bondholders, excluding, however, coupons maturing after December 5, 1929." It set forth that the trustees of such stock "will be three in number, two of whom will represent the bendholders and one of whom will be the managing trustee of the Leight Trust." It advised the bondholders that the committee had re sonable assurance of being ble to make a new loan in an amount sufficient to carry out the plan; and that this new loan "will be secured by a first mortgage lien on the property."

this of the initial of the control o

The plan was emagriced to a four-early state as the Time, let a confirmat officerous and follows one to brongester inf is lost and share the Loudinaldean time the equitions with an interest After the party of the Louisian interpretation of the color of the color of the colors Assiding aumonic acide tools took at the teat the .tooks mile that Glare torong bose Institutes the arms - Timed decores estanced air rein--me unitality non probably maid uninggood to make mean basequery but of Afrew bank and the white erla delah of besimpre of neithrog Indig o multipo nati em al lafmou moltarog ec uen esta tenta has aboyevade villeting three fruit in a command and the mane of the last three in the committee in the committee of the c this eight are appropriate the contract of the 'ampany reorganiant' and colors distill a state of the design of the design of the state of anged will best and be seen oil chemis upon Secure durit bestamic reducer lo with the condition within the dig levels of a specialistic of the Moss. To so who and show the I the Terror of comban concert of collister. in the new comparetion for each with in par with a carribor in-tack ent Loriena der by go mad hand ook lidh. Bedden gob and was lan abnod em. litting, be ever, enurer indealing offer a sain of the little of the little 5.0 - trefatte of count of filter doors done to meeters out took dive! self of fift world to one on anotherines set in early we live most to mobile for and and besitter of the surf fricted and to best and quipewer the last in an enough outliefund to commy out the plant in the time Targinagen - da ne mill agenfrett firtil er ji benmeet se illim mol It further recited "in conclusion, the Committee desires to emphasize the fact that upon the consummation of this plan of reorganization the conductors who have deposited their bonds with the Committee will, through their trust certificates, be the sole owners of the entire property, subject only to the new first mortgage loan."

The plan made no provision for the payment of the Leight & Company interest coupons or for the issuance of any beneficial interest or stock in the new building corporation to the Leight trustees in lieu thereof. The plan was approved by approximetely 99% of the bondholders, who became the beneficial owners of the stock of the new corporation. It was consummated and carried out substantially as outlined to the bondholders. The new 14 lest Mink Atree & Elm Street Building Corporation was formed. Its stock was issued to three trustees, one of whom was Loeber, the managing trustee of the Leight Brust, and these trustees issued the certificates of beneficial interest in said stock to all holders of unsubordinated bonds and coupons who had assented to the plan. The new corporation, as contemplated by the plan, acquired title to the real estate and negotiated a new loan of . 120,000 from the Penn Mutual Life Insurance Company on notes aggregating that amount secured by a trust deed, dated April 15, 1932, from the 14 Jest I'm Street Building Corporation. The proceeds of this loan were used in meeting the expenses of reorganization as itemized in Mxhibit "A" of the printed plan sent to the bondholders. The 14 West Blm Street Building Corporation having acquired the equity; redemption was made by it from the Toreclosure sale, which had been held May 6, 1932, when the property was sold to Fred W. Heide, a nominee of the bondholders.

It was not until approximately one year after the rights and interests of the bondholders, the new corporation, the new

The restriction of the construction of the restriction of the first of the restriction of

The plan way on provincion for the organist of the Februar Indo Demonstrate the country of the track to the track of the state of the median of the interest or ecolic to the new willding conjust it is to the Delicht of the inner the little the plant of the control of the section of rain to sure of distillent of the second of the distillent and to \$100 imp halame has believe ach to di .nelsenence ven une le modes Spor I was and a restantioned but of benisted an yelicitae to XXXXXXXXXXX ly strent building of the day of the district of the said yelman as only and sell and make to one about and same or beyone and trustee of the Leicht Eruct, and slace inquie . Le ust Le soulile. -dr. at la un berei the of feets bit a al footedat fairlioned to some won orighters good or software, but one anotype one abnor being had corpore tion, as contem dated by the plant re-dir-d title to the real cate and megatical and a new lang. He first the land turent told guides, togs deten ne ymmuet eenemeel siid Louisi secured by a trust doed, deted april 16, lyde, from the life se Min Street Building Corporation. The prosection of Mais Rose ware the seninger's as notice has been to assume the eliteration at been Af off . say blackers of and or omen make besting and to "A" statefall Very she direct building Corporation in the continue to the equipy. redemption was under by it from the forcelouse sale, skelt has r reld May 6, 1932, when the proporty was sold on Mred .. . Melda, c samine of the boarders.

It rat not until apprenimately one year edter the recumination, the new corporation, the new

mortgaged and all others concerned had been determined, pursuant to the consummated reorganisation plan, that plaintiffs attempted to assert any adverse rights based upon the interest coupons which they had acquired from Leight & Company or upon the subordinate lien in favor of Leight/Company found and adjudged in the decree entered in case No. B-196773.

Defendants claim that the subordinate lien which the decree of the Circuit court of March 14, 1931, in case No. B-196773 found Leight & Company was entitled to under the trust deed, was exhausted by the foreclosure sale under that decree, and that said lien was not thereafter revived by the redemption from said sale. It is sufficient answer to this contention to say that such decree specificelly directed the sale of the premises in question for the purpose of satisfying next only the indebt dness due the Chicago Title & Trust Company, plaintiff in that cause, as trustee, for its own use and benefit and for the benefit of the owners and holders of bonds and interest coupons, excluding from such benefit the amount due to Leight & Company upon its subordinated interest coupons. It is admitted that the decree in the original foreclosure proceeding would have been erroneous if it had directed a sale upon failure to pay Leight & Company or the Cosmopolitan State Bank, as the junior mortgagee, or the Derby Steam Laundry Company, as a judgment oreditor, the amounts found to be due them, respectively, and for which it was found they each had a valid subordinate lien, wince neither of said parties filed any pleading asking affirmative relief. All that they were entitled to was to share in the surplus proceeds of the sale, if any. The decree in case No. B-196773 provided for the sale of the property and the distribution of the proceeds of such sale and was sufficient for the purpose of ordering a sele of the property free and clear of all liens, subsequent and subordinate to the lien securing the unsubordinated bonds and interest coupons.

to the somewhat is equally then while its interpose thing to the suppose thick to arrest any adverse of the brains of the black that interpose the interpose that there is the brains of the suppose the first black of the cold of the ordered that they are the brains of the ordered the ordered the order the order the ordered the order the order the ordered the order the order

will suder the California the arthory in the party of the court of the Circuit cours of Linch 14, 1901, in come to, 3-106976 fours Totalenter of a first of the set of all the set of all the arm temperature of a single of the set o by the losesloudes arise duck doctes, att. thet anis line from west of 37 .82 w with Govir maidemeter and the contract ton miliated the answer to this contration to any that the agency decree ficelly directed the enland the premines in checkies for the murpote of mailsfying and only the had the dress on the chief of the & Truss Congrey, plaintiff in their or use, no tructs, for its arm 'ra twoddod bue gram a ord to tib med and wet bus tit med bus sup bonds said interest compone, organism private ones boardis the carpage it . megere inserial beinabroden sit men transmob i injiti es abb is edmitted that the enquee in the original . sealinger of the would have been errancess if it had directed a collection it flats to pay Laight & Company or the Compositors three Cash, as the creditor, the marks lound to be one shon, respectively, and in wall's essel of the first of the second block of the second first of the second states and the second secon neither of said perties thied ony pie ding seids of him tive talief. All that they were earliched to are to the character greeceds of the classif eny, The decree in once to T-180773 provided for the dele of the property or the distribution of the proceeds of to with a timbe from to encounter out woll in icidize any bas also will the property free and older of all lives, anterquent and observinged

o the lian securia, she un ubordingira boats sad intere, & caugens,

The purchaser at the sale acquired the right to obtain a master's deed at the expiration of the redesption period, free and clear of such liens, and would have so acquired the property if redesption by the grantee of the mortgager had not intervened, reinstating all the liens as charges against the premises in the order of priority set out in the decree, except the lien of the unsubordinated bonds and interest coupons, which was foreclosed.

In Hack v. Snow, 338 Ill. 28, where redemption of property after foreclosure sale, under analagous circumstances, has held to have reinstated the subordinate lien of a judgment creditor, the court said at pp. 31-32:

"It is claimed by defendant in error that the sale of land under a decree of foreclosure is a sale of every interest in the land belonging to any party to the suit and discharges the land from every lien of such party, and she cites authorities to that This, of course, is true where the decree orders the effect. payment of all the liens and a sale is ordered for all such liens, the sale made, a se difficate of purchase issued, no redemption made and deed issued. In that case, no redemption having been made, all the title which the nortgagor had at the time of the making of the mortgage, and all liens subsequent to the making of the mortgage, are wiped out and the purchaser takes the fee in the property unencumbered of such liens. In the instant case the decree did not order Liesik's judgment paid nor order the sale of the property for the payment thereof. The property was redeemed, and by virtue of the statute the mortgage, its fereclosure, the sale and the certificate of purchase become null and void and the property freed from the lien thereof but subject to Liesik's judgment lien. Liesik having a valid judgment lien upon the property was entitled to have the property sold in satisfaction thereof."

It is clear from the language of this opinion that unless a decree foreclosing a prior lien contains an unequivocal provision that the property be sold to satisfy a particular junior lien, then upon redemption such junior lien is revived and can be enforced to the same extent as if foreclosure had not been had.

It is next claimed by defendants that Leight & Company, by reason of the advancement of money to pay the interest coupons in question, did not acquire under the circumstances surrounding these transactions such ownership of or interest in said coupons as entitled plaintiffs, its successors, to maintain this foreclosure suit.

ក្នុងក្រុងប៉ុន្តែ មានជាតិសេសពី១ ១៩ និសិទ្ធិកា ទេវិសី សក្សាស្តី ស្រុ

The Lotte process of the contract of the contract of the process of the contract of the contra

ngare and to make and a second color of a second of the and property of the color o

When a doorse or showed by tell, along the entry the below of the of lend under a doorse or showed below of the control of the lend of the

It is alsor from the lan uage of this painton that make a column foreclasing a price liter on today of mayoring a price law tack and property be said to untisty a particular justor liter, then such justor liter to revived and that had been docted to the

rendon of the selvenouscult of noney to joy the defect that an one for the good of the self-cult.

Nostion, did not establish under six of entropy of the self-cult in . It and an or delicited the self-cult of the self-cult thin from the self-cult.

Specific provisions of the trust deed, heretofore set forth, declare that in the event leight & Congany advanced its or : funds to the owners and holders of interest compons in payment thereof on or after date of their maturity, it was not a mere volunteer but a purchaser of said coupons, and that in the event of the failure of Leight & Company to give the required notice of its election to hold such interest coupons upon a parity with all other bonds and interest coupons secured by said trust deed, they then became a subordinate lien upon the premises. The trust deed was a valid contract between the mortgagor, the trustee, the bondholders and Leight & Company, and every owner and holder of bonds and coupons secured by the trust deed, as well as the mortgagor, is bound by its terms, including the definite provision therein that the interest compons in question should remain alive and unconcelled, and that the payment of the coupons in question by Laight A Tompany "shall not be considered a voluntary payment." If plaintiffs were elaiming that their interest coupons were held on a parity with the bonds and other coupons of the isoue, a different question would be presented. Then the first mortgage bondholders would be entitled to notice that coupons were being so held unconcelled because of the possibility that their security might be impaired by such a practice. .hat possible difference could it make to a bondholder whether or not the coupons at the time they matured and were paid by Leight & Company were actually cancelled or held in a subordinate position? In either event the prior lien of the bondholders could not be adversely affected. Plaintiffs, in our opinion, did acquire ownership of said coupons and are entitled to maintain this foreclosure proceeding unless estopped by their conduct from so doing.

The next question presented for our determination is, even though Leight & Company did acquire ownership of the interest coupons and even though such coupons were not foreclosed in case No. B-196773.

e profitie growing and the first of the first of the first of the company of the

interest company scaued by cold thus t least they shim browns a -mar ellen o new bern dawerd est advoluters like ween well adealeredus ಕ್ಷಣೆ ಕಿರ್ಮಾಣಕ ಕೇಟು ಬರುಕ್ಕಾರಿಯ ಕ್ಷಣಕ್ಕೆ ಬಿರುಗಳ ಕಿರುಗಳಿಕುತ್ತಿ ಭೀರ ದಿರುಗಳ ಕೇಟ್ ಕ್ಷಣೆಗಳ ನಿರ್ದೇಶಕ ಕೆರುಗಳು a remone, the same and which is to a base, her transfer that the transfer of a . numer odd gaf R. prod all gregorydwon odd an lifes en gened twois ead ta meet to the full sid tight rie word med diving ethnics sid paintent from the first the continuous of the continuous and the second of the se of the confound is greatly by a finite or against the bold anognous said with the country and the country state that the country state of the country of t attended compound with inch a gallage with the compound with compone of the drawe, a 11 want of an raid of the Marn dual telephone of the little ad big we but blothered against the dwell and Trific Page 1 and the barre of building can along a grass of a progress that that a carter might to him his by take it follow that end don to the ble to chook not not offer the bigg a pometolitib eldianou Takingson D. Dang into the Ging oreas been betterfore the could be discovered madic of their long of abstracts and blan to bell one offerior erow There's select blues to block and in mil toing and the floster Chainsiffs, in our cyinion, did sociate our mility of a 13 -in galest components to a lift which all on bold to a second on the con-ស្ត្រារំខែរៈ ២០ ពេក្ស ដីស្រាប់ពេល ២៤៤៧ប៉ា កូច បែកក្ពុក្សាស្ថា ១៣៣៣

Tito neut quention procention for our d'échila blem is, even

e on a character were not forcells and do do do malle

are plaintails equitably estopped from assocting any claim of lien against the real estate acquired by the bonchelcers pursuant so the reorganization plan. The testimony of hre. Cleveland that legtmeier, atterney for plaintifis, approved the plan of reorganization, and authorized her to inderse such approval on the letter comprising the plan before it was mailed to the bondholders, is corroborated by the failure of Loeber or either of the other plaintiffs to object to or protest against her action in appending approval of the Leight trust to the plan. It is admitted that Locoer, managing trustee of the Leight Trust, received and receipted for copies of the printed plan and follow-up letter mailed to the bondholders, both showing approval of said plan by Loeber in behalf of the Leight trust, and it would seem to render it immaterial whether or not Loeber's approval of the plan was originally had, since with full knowledge he failed to disavow it. Plaintiffs insist that the doctrine of estoppel cannot be invoked against them because the bondholders, through their conmittee, had actual knowledge of the omission of the Leight trust from participation in the proposed reorganization, and are presumed to be equally commizant with them of the fact that the lien of the interest coupons owned by said Leight frust was not extinguished by the sale under the foreclosure decree in case No. B-196773 because of the subsequent redemption therefrom.

The obvious purpose of securing plaintiffs' approval of the plan of reorganization was to induce the bondholders to agree to the plan and deposit their securities with one of the designated depositaries of the committee. It is fair to assume that the relations between the Leight Trust and the bondholders and its influence with them, as well as their confidence in it, were undoubtedly counted upon to encourage the bondholders to accept the plan. Whether plaintiffs actually approved the plan of reorganization or failed to remounce the placing of their approval on it when they were apprised

The obvious purpose of securing phisheritis approved of the polymone of the plan of reorganization as to include the bencholders to agree to the plan and deposit that securities with one of the estimated their securities of the consistion. It is felt to askure that the print frust and the bondholders and its influence with them, as well as their confidence in it, were un ordered a contact upon to encourage the bondholders to accept the plan. Asture of the plan of accept the plan.

thereof, the result was the same in so far as the effect on the bondholders was concerned. Not only once but twice plaintiffs sat by and permitted the bondholders to believe that the Leight trust was actively perticipating in the plan by its approval thereof. The very plan itself indicated plaintiffs' active interest in its consummation by reason of Loeber's selection as one of the trustees to hold the stock of the contemplated 14 fest Lim Street Building Corporation and to distribute the beneficial interests therein to the bondholders, and by reason of the provision therein for the payment of \$4,375 for "Leight frust expenses allocated to this building."

It must be borne in mind that the plan as outlined told the bondholders that to effect it the committee had reasonable assurance of being able to make a new loan which will be secured by a first mortgage lien on the property" and that "upon the consummation of this plan of reorganization the bondholders who have deposited their bonds with the committee will, through their trust certificates be the owners of the entire property, subject only to the new first mortgage loan, H It must also be borne in mind that pursuant to the plan the loan of \$120,000 was made by the new corporation; that the title to the equity of redemption was acquired and the property redeemed from the foreelosure sale as contemplated by the plan; that approximately 99% of the bondholders deposited their bonds and received in lieu thereof certificates of beneficial interest in the stock of the newly organized 14 West Ilm Street Building Corporation; that at no time during the period and process of reorganization did plaintiffs make any demand based upon their ownership of the interest coupons or the lien found in their favor in the decree of foreclosure in case No. B-196773; and that it was not until approximately a year after the reorganization had been completed, when plaintiffs brought the instant foreclosure suit May 16, 1935, that they for the first time

Corporate to the contraction of the contraction of

and the borne in which there who exerce a confidence to the bencheders thet to wifeet it the semidisc interpolation of the consider de il - go tarment of ille debi and tone a the ot elide paiod to is no a remands with regard said the typite out and no moid equiptem this plan of reorganism tion the beathold the kind here demonitred their se netrolities of the short three to the second this source the short the contract the and the contract residence of the contract of the contract of maly self of them ton tank bains all throof as other tamm of sensolings, elil out that the transcript or and you one. ... The ell to need out Trom the forceleanne to be at contraphet of by the place that the contraph at bewiseen in second abed bedisage's strategor and to bed vistam Lies thereof servillesten of be effect I interest in the cost of the on to find their the court mailtaing department that the at no ties curthy the puriod are prosess of reorganic tien did and merify ampered the season of the content of the same of the same of the content of the c or was they had at some could be seen as the THE COME A CONTRACTOR WHEN THE REAL PROPERTY AND THE ARREST AND the state of the first party and the contract of the state of the

content involved and the little part of the specifical line.

sought to enforce their lien upon the real estate the bondholders had beneficially acquired through the consummation of the reorganization plan fostered in part and participated in by plaintiffs.

It is not charged that plaintiffs were guilty of fraudulent intent when they failed to present their claim during the paried when the bondholders were being induced to accept the reorganization plan, and it is immaterial whether the failure of the Leight trust to assert its rights at that time are due purely to oversight or was due to misapprehension by plaintiffs at to the law. They did not assert their claim when they should have done so and to permit them to do so now, contrary to the assurance which they joined in giving to the bondholders that the consumnation of the reorganization plan would result in their [bondholders] beneficial ownership of the property "subject only to the new first mortgage loan" would be to sanction what in effect would be an active fraud upon the wondholders. Fraudulent intent is not an essential element of estopuel. It is sufficient if a fraudulent effect ensues if a party is allowed to assume a position inconsistent with his prior declarations and conduct. In our opinion the principle of estoppel is peculiarly applicable to plaintiffs' conduct. In discussing the doctrine of estoppel in Bondy v. damuels, 333 Ill. 535, the court said at pp. 545-546:

"An equitable estoppel depends upon the facts of the particular case. The general rule is, that where a party by his statements and conduct leads another to do something he would not have done but for such statements and conduct, the guilty party will not be allowed to deny his utterances or acts to the loss or damage of the other party. (Neidhardt v. Frank, 325 Ill. 596.) The party claiming an estoppel must have relied upon material acts and representations and must have had no knowledge or convenient means of knowing the true facts. (People v. Chicago, Burlington and Quincy Railroad Co., 290 Ill. 327.) Fraud is a necessary element of estoppel but it is not essential that there be a fraudulent intent. It is sufficient if a fraudulent effect would follow allowing a party to set up a claim inconsistent with his former declarations. Estoppel may arise from silence as well as words. It may arise where there is a duty to speak and the party on whom the duty rests has an opportunity to speak, and, knowing the circumstances, keeps silent.

app. Le face and the fate and the new and acree and winds were been at the man -known and to be better as the sector of the world for all the sectors and the sectors are the sectors and the sectors and the sectors are the sectors and the sectors and the sectors are the sectors and the sectors and the sectors are the

inality on a lim o not initially below in the legents out it Spirite wife militio in the **resul**t for the old selection made in the second when the beneficedown being darlaged to against the crown thing the warms out it to seem to the control of the control of the control to meson the religious of the since of the since purely to or weight so or the den die geste work este da en Officialiste geleet de moderngemin et ond unit diming of his on onch over biscoin yell in in minio cimit drouge grivi, ni baning a sit doing commune only or materials from ou by es mair maidalling to it said it holistrassance and it is attabled beed of wonld reanly in their [toneholders] burilland of . mainly of the ad wi bilbow "mood spandarm is all you off or time insidual vivosota. -broid and never brown sylder no set bise v deelin al don't neitense holders. Franklink inting to not en couchilia it of ortogect. It is sufficient in a free valuat effect connect in a party is ellered to esame a parti o incommist of his prior declarations and confuct. In our opinion the principle of triopped is proudingly To entract the description of the description of elderifted estopped in leady we consile 888 (d. ober due court waid to pre-

The case of the local and against against alight of the case of the case of the short of the same of the same of the latter and a short of the case of the same of the latter and the latter of the case of the ca

(Milligan v. Miller, 255 Ill. 511; Oliver v. Rose, 298 id. 624.) It is the duty of a person having a right, and seeing another about to commit an act infringing upon it, to assert his right. He cannot by his silence induce or encourage the commission of the act and then be heard to complain. (11 Am. & Fnc. Fncy. of Law, - 2d ed. - 427, 428; 16 Cyc. 771-796.) Unreasonable melas, unexplained by equitable circumstances, has been declared evidence of acquiescence and will bar relief.

Plaintiffs suggest that the reason their claim was not presented b fore the bondholders had materially altered their position was because of their misapprehension as to the law, in that prior to and during the period of reorganization they were of the opinion that their junior lien was extinguished in the other foreclosure proceeding and claim that, inasmuch as the first were equally known to the bondholders or at lest equally accessible to them, the rule of estoppel is inapplicable. This contention is without merit. Regardless of such facts as were within the knowledge of the bondholders or which were equally accessible to them, the material and all important thing which they had no knowledge of. and which plaintiffs had induced them to believe did not exist, was the lien which the Leight trustees now attempt to assert. By reason of the conduct of plaintiffs, the bencholders agreed to the plan of reorganization in the confident belief that through their beneficial trust certificates in the stock of the 14 est "Im Greet Building Corporation they would be the sole owners of the entire property, subject only to the new first mortgage lien of 120,000. In lione v. South Park Comm'rs et al., 119 Ill. 101, the court said at p. 117: "The party who challenges the title of his adversary to real property must be diligent in discovering that which will avoid the title or render it invalid and diligent in his application for relief. We think that principle is equally applicable here and that plaintiffs! predicament is chargeable solely to their lack of diligence in discovering their rights and asserting them. The bendholders surely were not chargeable with the duty of discovering plaintiffs' rights,

the second secon

with the searching the least as the following multiproper of both was in all the local or as moles have the class to one cod and moisting there it must main guoon to colony are guider bas of moting tank of the opinion that their famion lies ... other while the it it a endir weer this so the the compactations all as around the seasons the then rule of enterpal la languales This . it is the the -fremi to thit to man do a jest them we such that the street for error of the unfall country a filler per control of the month of the control of t the meterical and alapostant chiup dade dienche de la lanc decige et. and which elainties for it is no deal and so believe all may entare, and the little bild black of the contraction of the contraction of the contraction to refer one of the responsible to the following the temperor of the the little serve and it is the set of the control of setting fourth Compartition they really be time actor of a continual fire and the continual of the property of subject maly to the new state more more alies of the get a loss to AMEL of the wine, bused out after will and on the more it. AMEL Tire to the control of the control o as effit the ploys fire deads this guitovocate at the gifth of turn o. ". wife what noise sligge aid all angiffs ban bifewak di usbest and the state of t profilement to that points cannot control of the soldings. the common of the title of the state of the state of property supplied and property for the same of the appropriate

and we think it would be unconsciously under all the circumstances to now impose upon them the burden of claimiffs' lien claim amounting with interest to more than \$40,000.

re have carefully considered such other points as have been the urged and all the authorities cited, but in view we take of this cause we deem further discussion unnecessary.

For the reasons stated herein the decree of the Circuit court is reversed and the cause is remanded with directions to dismiss plaintiffs bill of complaint for want of equity.

REVERSED AND REMAIDED.

Friend and Scanlan, JJ., concur-

anom favorelle envil. In literalle member et lime likistelle pertent -francom militari in filskrif bill bill en er enselle tri til krim en militari et so - nogett bill en billen skriviski bill billen mi

LETT OF STATE OF STAT

diment of the month of the following of the state of the

PAUL C. LOHBER et al., Appellees,

V.

14 WEST FLM STREET BUILDING CORPORATION, a corporation, et al., Appellants. APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

ADDITIONAL OPINION UPON PETITION FOR REMEARING.

Plaintiffs filed a petition for rehearing April 9, 1937, in which they contend inter alia that this court "disregarded the proposition that any action or failure to act of Paul C.

Loeber, who was only one of the three plaintiffs, all of whom are acting in the fiduciary capacity as trustees, cannot be regarded as constituting an estoppel since the express declaration of trust appointing him required the concurrent action of two out of three trustees." It is sufficient answer to this contention to state that the question raised in the contention was raised neither in the trial court nor in plaintiffs' brief filed in this court, and that it is the recognized and established rule that a question presented for the first time on petition for rehearing will not be considered.

PETITION FOR REHEARING DENIED.

esto so thent as it ering Litter.

THE PART OF THE PARTY OF 10 a 25% 20% Mo e.La to onday I Louge i.

ANTERSO MINOR ASSESSOR

The state of the s

Finistic filed a political for remarking a boil's ellistical istraporals turo a dita and alle adul bretans yell deila al .t for the term of the first to refer the best meditioners with Loopey, who was ealy one on the three definities, all of them ed forme o the charactery our yele not the characters, or much as regurded as constituting an entagged since the empress deglaration of trust appointing him occurred the comment setion of two cut of three trunctous." It is andiac in caracto this don tention to state the told question relieved in the with all of the wor care I have by the state of the bouler and reinforce -so but backgood out at the death and the backt teind Ho smit this to not bedemour neadth of the lim bedeildet petition for rehearing will not be couchered.

MELVIN L. STRAUS, as trustee, Plaintiff,

V.

SAMUEL E. ZUKER et al., Defendants.

SAMUEL E. ZUKER and HANNAH ZUKER, Appellants,

0.0

HARTIT GRATZ KEENE, MOVIN FURDINAND KEENE, FRANCES ELIZABETH KEENE, NORTHIN TRUST COMPANY, as trustee; under the last will and testament of Caroline Baker Keene, deceased, and CHICAGO TITLE & TRUST COMPANY, a corporation,

Appellees.

43t

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

19 I.A. 610

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a decree entered Februry 3, year

1936, cancelling a ninety-nine/leasehold to certain property involved herein and directing the receiver to surrender the possession
thereof to the intervening petitioners, who were the omers of the
fee of said property.

Samuel B. Zuker and Hannah Zuker were defendants, among others, in a proceeding brought by Straus, as trustee, in 1931, to foreclose a mortgage bond issue on the leasehold covering the property in question. They appeared and filed their answer in said action by H. J. Rosenberg, their attorney, who is also their attorney as appellants here. The building on the leased premises was in the hands of the receiver appointed by the court in the foreclosure

(Missih:£:

5 7

e. La do A.DM e. A.DMM andman 2. 1

្លេងពេញនិងមហ

D 1

MACIN CAME FOR , WALL OF CONTROL OF MACE OF THE MACE O

\* droubleugh

## ANDROCK MET OF ANALISTS WHENEX IT VALUE

China and a color como a carevar el mireo foraggo diff colomo me militar en cari o medio guisce, in hus minred barler auc an arma colo cum din purchois ince guiscerais sub cari son ince

fee of mild proposity.

others, in a presecting brought by strang as brund or in 15. is no forestore a more gage based trong on the learness covering the property in succession. They appeared an alike their a ser in and decion by F. J. is semiwary, the strange, the skerney will of this etremory.

DESCRIPTION OF ALTERNATION OF MANAGEMENT AND DE MANAGEMENT

action. The ground rent under the lease was not paid since February, 1933, and taxes which the lessees covenanted to pay were in default for several years. On account of these defaults the owners of the underlying fee in the fall of 1935 served the proper notices and took all steps required under the provisions of the lease to effect a forfeiture of same. The fee owners thereby became entitled to possession of the premises. Because such possession was in the hands of the court's receiver in the foreclosure proceeding, it was necessary to apply to that court for an order directing the receiver to relinquish possession to said fee owners. This the fee owners did by filing their intervening petition in the foreclosure action, setting up the foregoing facts and asking for such order. To this petition the Lukers, among others, were made defendants and they were served with process issued pursuant to the prayer of said petition. Notice was served upon H. J. Rosenberg, the attorney for the sukers, in the loreclosuse case of the application for leave to file said intervening petition. attention was paid by the Sukers or their attorney to said process or said notice. They wholly failed to appear in the matter of the intervening petition. Nevertheless, January 10, 1936, a further notice was served upon attorney Rosenberg/January 13, 1936, application would be made to the court for a default order as to the Zukers. No attention was paid to this notice and January 13, 1936, an order was entered of record finding that Samuel W. Suker and Hannah Zuker had failed to answer or otherwise pleed to the intervening petition and / that same be taken pro confesso egainst them. We further notice of the proceedings under said intervening petition was served upon the lukers, although the subject matter of same was referred to a master, who heard evidence and filed his report pursuant to which the court entered its order February 3,

contact the contract contact will be a contact to the form of the contact of the Taboraray, 2003, to be true defect the Care Care to the Survey 2003, the care ing the first secreta is a second of the second of the second is not a fine the table of the second with some softened the filter call oil soft quirgite both all the areano off and laber by the color to the top of a file feet been the feet tegotog of the leade to calledt lightains of mark this in any resument a small the old the Malinermore of bull large served velocate the missission of the control of the state of the takes and Mess forcelours proceeding, it is a second to specify to specify to the true of self the common of the first distribution of the common of vening poblisher dat but where there was continued to being up the first colugn facts and subling the could be the collection that the carry Dominic tracects, with the visit of the first former of the atom even the and the contract of the contract particle of the choice of the contract of the sours for all the source of the constant of the cole year of the full graduous all to the applie blam nor leave to while the interm. Alm politicm. To and the control of th this To this are all the property of health's Table of the section blue to notion was nerved upon o'terney Louenberg/Survey 18, 1886, opallthe of the well of the court true cold or show of blue mortion Eulers. It was notice who property of this sector of the Transfer Time and from the first . The second duck the first broken to barefro sew rebro ma Manuah Buker had failed to was not on phaseins plant to the interpvening perition and area that were not bug peritian of the description of the same of the gain to the heart we have species and the color weithout of 🙃 📜 water to the second of the second sec 

and department of the property of the property

1936, directing the receiver to relinquish possession of the real estate to the intervening petitioners. Counsel for the Zukers happened to be in court on another matter connected with the receivership in the foreclosure case when the master's report was submitted for approval and moved for leave to file exceptions thereto, which motion was denied.

The Zukers contend that the proceedings before the master, the approval of the master's report and the entry of the decree were irregular, improper and void because of the failure of the intervening petitioners to comply with the rules of the circuit court as to notice; and that, having been defaulted for want of an answer and not for want of an appearance, they were entitled to notice of the reference to the master, of the hearings before the master and of the completion of the master's report, so that they might be afforded an opportunity to file their objections thereto, and of the presentation of said report to the court for approval.

The intervening petitioners insist that the appellants as defendants to their intervening petition received all notice to which they were entitled under the law and the rules of the circuit court.

In Bruner et al. v. Battell, exec'r, 83 Ill. 317, service was had upon the defendant by publication and he assigned as error the failure to give him notice of the reference to and hearings before the master, notwithstanding that he had been defaulted for want of appearance, the court said at p. 322:

"The defendant had all the notice to which the law gave him the right, as a non-resident. So far as the subject matter of the litigation was concerned, he was, theoretically, before the court. He was entitled to answer if he chose to do so, and when he did not do no he is presumed to have waived the right. By waiving the right and permitting a default, he waived the rights incident to a contest upon an answer. It was said by this court in Moore et al. v. Titman, 33 Ill. 366, that 'it is only in contested cases, where a reference is made to report evadence or to hear proofs and report facts, that

1036, sixossin; sin acordon to velicalità la godica de la legación de la del como de la como de la

e and the Meridian of Lord or this economy and finely Densities are then self

the appropriate for the manufactor of the case of the forestage of the forestage of the forestage of the following points and the case of the following forestage of the condition of the following the case of the condition of the case of the condition of the case of the

of animon lie would a manifolder minerate this will be adminished as a finished as a f

and the second of the second o

In Drungs of plants of publication and the cast of the cast of the cast or and the cast of the cast of

<sup>&</sup>quot;The ference of the collection of the second of the collection of

the rule [requiring notice to be given the defendant to appear before the master] is applicable. It is true, the parties being in court, they have the right, in a case where the bill is taken as confessed, to appear before the master, on a reference, if they think proper. But in such a case the practice does not require notice.

In both the Bruner case, supra, and the Moore case cited therein, the defendants were defaulted for their failure to appear. In Craig v. McKinney, 72 111. 305, where the rule announced in the Moore case is distinguished as not being applicable to the question of whether defendants who have been defaulted for want of an enswer are entitled to notice of all the proceedings before the master, the court said at pp. 313-314: "As an authority that such a notice is not required in cases where a default has been taken and a reference is made, Moore et ux v. Titman, 33 Ill. 358, is cited. The rule there laid down was correct as applicable to such a case as that, where a bill to foreclose a mortgage had been taken as confessed, and reference made to the master to ascertain the amount due and report to the court. The duty of the master there was one of mere computation from written evidence of indebtedness in the case, admitted by the bill having been taken pro confesso. No reference there was needed. The court might have made the computation from evidence already in the case, and have pronounced the decree. But to extend the rule to all cases where a default has been taken, is not warranted by authority. In 2 Daniels Ch. Pl. and Pr., 3d ed., 1152, the author, in treating on this subject, says: "The general rule, that all persons having an interest in the result of the proceedings should have notice of the attendance before the master, extends to cases in which a defendant, after appearance to the subpocue, has allowed the bill to be taken against him pro confesso, and a decree to be made for want of an answer. we are of opinion there should have been, here, notice to the defendant of the taking of the account, so that he might have had opportunity to appear before

the rule ironalitany notion to in given the initial to a condictor the marker interpolation in the property of the control of

in bead through a country of the state of the state of the state of the In Grain v. Molimmer, 72 blis day, there the rule amount in the uniquent will be place bloom grains for we bedalog mittals at same stool yourrough To this hold brokenish bused over only become is a midted of its perduces the establic and become and fit the public of boiling our entions a down typic of the disso reposite . Offention of the bine trues ont a type mod to one and the call the color of color and for the section and reference is made, Morre of the Vilames, N. Mil. 188, is eited. name a Norm of hidrolifer: in feature and much bind cruft give aff en mode di merci de al e proposer a conformation de filial a arada , Jent us configued, and restarge made to the ma ten up arger; in the anoma and a morally to the order to give one of the all at the order to the odd of ment and compared to be a street of the contract of the contract of the compared of the contract of the con cose, admirted by the bill inving but the one graph of reference there was needed. The don toalthe have and the contract than rom evidence already in the case, and have green seed the decine, but Cost sk greated from the control of the control of the second from the control of warranted by authority. In S. Jemiels Cit. T. and Project Cit. of ... Ilbid. the swiher, in transling on this subject, eager "this warm I make, agaib score; his to slaver said and from that are a mixed ared again that of this o ending our cound companded out to colion wind blucks ances in which a defendent, effers ones we no to the absorue, her cliff end to one country of the country of at life end bowles have been, here, notice to the defendant of the telding of the

count, so that he might have bed opposituation to the sent or country

the master on the reference."

It will be noted that in the <u>Craig</u> case the reference to the master was for an accounting as it was in <u>Acme Copying Company</u> v. <u>McLure</u>, 41 Ill. App. 397, where the court said at p. 599;

"The practice in this State as to notice, both at law and in equity, is too loose for safety. But the case of Craig v. McKinney, 72 Ill. 305, has set a limit in one particular. That case was not very unlike this. A default for want of answer after demurrer and plea overruled, was entered, upon a bill filed for an account; \* \* \*. The court held that there should have been notice to the defendant of the taking of the account."

In Armstrong v. Douglas Park Bldg. Ass'n, 60 Ill. App. 318, where default was entered for want of appearance, it was said on p. 320:

"A distinction exists between decrees pro confesso under the statute for went of an appearance and decrees pro confesso for want of an answer after appearance. In the former, there being no one whom the plaintiff can serve, all the necessary proceedings may be ex parte. Daniells Ch. Pleadings and Practice, 5th American edition, 1175; Van Valkenburgh v. Trustees, 66 Ill. 104."

While the case of Straus et al. v. Biesen, 242 Ill. 370, involved an action at law, we think that the reasoning therein is equally applicable to/proceeding in equity. In that case the court said at pp. 373-374:

"Plaintiffs contend that the rule requires notice only when a party is not in default and that defendants being in default for failure to plead were not entitled to notice, citing Precision Products Co. v. Gady, 233 Ill. App. 72. Undoubtedly this case so holds, contrary to Kalkaska Mfg. Co. v. Thomas, 17 Ill. App. 235; Chicago & M. Mlec. Ry. Co. v. Krempel, 116 Ill. App. 253; American Mail Order Co. v. Marsh, 118 Ill. App. 248, which cases the opinion undertakes to distinguish. The Gady case seems to rest on the holding of the Supreme Court in Cramer v. Illiaois Commercial Men's Ass'n, 260 Ill. 516, where it was held that, unless there is a rule of court requiring such notice, there is no error in taking a default where the defendants have failed to plead.

"We are inclined to agree with the decision in the Cady case in so far as it holds that the default order should not be set aside. But there is another point which is not discussed in that or in the Cramer case. It is the established practice that the defendants rights are not wholly foreclosed by the default. While such a default admits every material allegation of the declaration, it does not admit the amount of damages and upon the execution of the writ of inquiry before the court, while the defendant cannot introduce evidence tending to dispute the

the marter on the reference."

it will be neved that in the Traing case the reference to the master was for an accounting as is the in concionating legrang

will to high estion of an otest airs mi contecung soft and in equity, is too loose for estery. But the case or Crain That ease not very unlike thing. A defeat of very ten saswer after demarks and place overcaled, has catened, upon a bill filed for an account; . \* \* The court held that there should have been notice to the defendant of the telding of the secount.

In Ametron, v. Doutles lock Mide. Assim, 60 Mil. . . . . . . 318, thors default was entered for from of commence, it was seid on p. 520:

"A distinction animits Detween A serves up o enfect o under ossolinos our arsaush has comercence in to time rol edutate ent ior want of an our of ter appearance. In the Jointon, there's being no one whom the plaintiff our serve, all the necessary proceedings may be in paris. Decielled in the chara end Practice, 5th American coltion, 1175; Van Velkanburch v. Trusteer, e, log , fit ha

. Mile the case of Street et al. v. Licken, Sta Mil. 870, involved an action at law, to think what the necessarian oqually applicable fo/pressoning in a quity. court agid at pp. 573-574:

"Plaintiffs content the tole required nector only when a party is not in declarat and that collendants being in default for failure to pland were not entitled to metice, siting recision Freducts Jos v. Cody, 135 ill. App. Vis Undorbiedly this case so holds, achtery to iclianto life to, v. homes ly lll. app. 205; Chicomes lo. 1200. Co. 1200. C case seems to rest on the holding of the lurens jourt in Thiner v. Illians Gommercial Men's les's, 186 Hil. 516, chare it is the half that, unless there is a rule of court requiring such notice; symi of man los ente o death that the trans of a casti failed to plead.

"We are inclined to agree with the decision in the Only od fom alucia robro fluckah odf todi saled ti es ret as ni suca as aside. But there is another point which is not vicewood in that or in the Gremer case. It is the out blitched procides that the derendents' rights are not wholly foreslessed by the deland; While such a default admits every moterial allegation of the more our seguent to amount six the same per the contraction. and the state of the said of the said in t defendent cennot introduce evidence tending to dispute the allegations of the declaration or to show that the plaintiff has no cause of action, which are admitted by the default, still he has the right to appear and cross-examine plaintiff's witnesses and introduce witnesses on his part upon the question of damages, ask for instructions on that question and preserve his right for review on that branch of the case by a bill of exceptions. Cook v. Skelton, 20 Ill. 107; Chicago & R. I. R. Co. v. Ward, 16 Ill. 522; Cairo & St. L. R. R. Go. v. Molbrook, 72 Ill.

The defendants were not in complete default. Their default admitted the cause of action, but not the amount of damages. Consequently, under the rule they were entitled to notice of the assessment of damages so that they might participate in the proceedings. In view of the number of suits in this county and the volume of business, this is a reasonable application of the rule. Williams v. Morton, 135 Ill. App. 112, and Ostrobramy v. Barczaitis, 139 Ill. App. 94, are directly in point."

All these cases recognize the rule that a defendant who has been duly defaulted for failure to appear has no right to notice of subsequent proceedings in the cause. In Graig v. McKinney, supra, and some of the other cases cited, it is neld that a defendant who has appeared, but allowed the bill to be taken against him proconfesso for want of an answer, is still entitled to notice of reference to and hearings before the master, if an account is requested, contemplated and actually had. The aukers attempt to bring themselves within the rule enunciated in the last mentioned cases by urging that they appeared and answered the bill to foreclose, and by stressing the fact that the intervening petitioners asked that an accounting be had of the amounts due and owing to them under their lease, and that they might have judgment therefor against such of the defendants as were legally obligated to pay same.

Notwithstanding that the intervening petition was filed in the foreclesure proceeding, was it not in the nature of an entirely separate and distinct action? The facts alleged in the intervening petition as to the defaults under the lease, the service of notice of forfeiture, the declaration of forfeiture, etc., weresufficient to support a separate action by the owners of the fee for possession. The only reason for the intervention was that the receiver in the foreclosure case had possession of the property. No issue involved

Filtradicty will beet with on to well moreover to entryelle gittle gittle planets of the state o

default addition file ocuse of review, but were a second of an addition of the contract of the

All thise cases we consider to we wish the consider we care on it is not been dody of faulters in the cases. In Crific we careful anyman of subsequent proceedings in the cases. In Crific we fractions who save a consecutive with a cases, it is note that the consideration of the cases of the

Noted the tendence proposeding, who intervents provided and Tilled in the forealounre proposeding, who is not in the neture of in unlively separate and distinct notion? The Prate Lange in the interventing petition on to the crimulto mades the lange in the interventing petition on to the crimulto mades the lange, the continue, the content of Forfither, the content of the samplers a separate action by and own or of the last terms for the content into the last of the last terms in the Present for the last of the last terms in the the last of t

in the matter of the foreclosure was involved in the intervening petition. The real issue raised by the latter was whether the intervening petitioners were entitled to possession and whether the receiver should relinquish it, and that was the only issue decided by the master or the decree of the court.

master. An inspection of the record discloses that the master merely heard evidence sufficient to establish that there were defaults under the lease and that the fee owners had properly forfeited same. There was no finding by the master as to any definite amount due the intervening petitioners from any defendant and the decretal order appealed from contains no such finding or judgment. There was no accounting within either the ordinary or legal acceptation of that term and the reference to the master was really unnecessary after the pro confesso order was entered as to all defendants to the intervening petition.

Whether the filing of the intervening petition is considered in the nature of the institution of an independent proceeding in which the Zukers were bound to appear, notwithstanding their appearance in the original foreclosure proceeding, to prevent their being defaulted for want of an appearance, or whether we consider their default in the light of their failure to file an answer to the intervening petition, no accounting having been either necessary or had in the hearing by the master and no amount having been found due and owing by the Zukers or either of them in the decree of the court, in our opinion, in the absence of a rule of court to the contrary, they received all the notice they were entitled to under the general rules of equity practice.

But there was a rule of the circuit court in force at the time the intervening petition was filed which covered the particular situation involved here and such rule is still in force. The law in the matter of the ferralemme and involved in the interventing petition. The med induce seight of the latent was abstince the interventing petitioned were emtitled so possession and wardings the recoirs the configuration it, and that was the only is the master or the degree of the court,

There was no accountfully by the true cause before the marter master. An inspection of the result hand evidence curificient to cotalish that the marter ware deficient under the lease and that the fee coners had properly fortaited same. There was no finding by the marter ru to any definite amount due the interventing positionend from such finding or judgment. There was no accounting that from contains no unch finding or judgment. There was no accounting thinking either the ordinary or legal acceptation of the first them and the reference to the archive weather the properties of the interventing petition.

Mether the Wiling of the intervening petition is considered in the nature of the invitation of an independent proceeding in which the Jukers were bound to appear, nothithmeting their opposition in the oxiginal foreclosure proceeding, to inverent their being definabled for went of an appearance, or whether we consider their Coffoult in the light of their follows to file in character to the intervening bettian, no accounting howing been either necessary or had in the hearing by the menter and no amount having been found due and entire by the menter and no amount having been found due and entire by the menter or them in the decise of the central, in our apiation, in the obsence of a rule of court to the contral, they were entitled to under the general rules of court to the centraly, they were entitled to under the general rules of court to the contral, and en

But there was a rule of the circuit court in force of the time the intervening patition and filled which covered the particular time the involved here and such rule is still in force. The law

is settled that rules of court, when entered of record, become the law of procedure in matters to which they relate when not inconsistent with statutes and are binding upon the courts. (Straus et al. v. Biesen, supra.) Rule 16, sec. 1 of the rules of the circuit court provides:

"No motion will be heard or order made in any cause without notice to the opesite party after such party has entered his
appearance, so long as he is not in default for want of an answer,
except when a cause is reached on the trial call and called for
trial. A defendant who has appeared, even though in default for
want of an answer, shell be estitled to notice, unless after
notice to him his default has been entered of record. But the
court may by order direct that notice of any or all proceedings
be given to any defendant so defaulted of record."

While counsel for the Zukers relies on this rule in support of his contention that they were entitled to notice of the hearings before the master, it is difficult to understand how it can be calstrued otherwise than as contrary to such contention. It states in clear, plain and readily understandable English that 's defendant who has appeared, even though in default for want of an answer, shall be entitled to notice, unless after notice to him his acfault has been entered of record. (Italies ours.) As heretofore stated, notice was served on the attorney for appellants of the motion for leave to file the intervening petition, and, pursuant to the order of court allowing it to be filed, summons was served on each of the Zukers. Thereafter notice was served on the atterney for appellants of the application of the intervening petitioners that said appellants be defaulted for want of an answer. The default of the Sukers was entered of record January 13, 1936. The notice given to the attorney for the Zukers of the application for default and the entry of the order of default pursuant thereto brought the parties squarely within the provisions of the above quoted rule of the circuit court and we are of the opinion that appellants received all the notice they were entitled to.

For the reasons stated herein the decree of the circuit court is affirmed.

AFFIRMED.

concert from to relate the state of the stat

Mai la demonata per el la contra del del contra del la contra del la contra del montro del montro del montro del montro del contra del montro del contra d

PROPERTY OF STATE OF A STATE OF A

states, notice was there are the the and for appellines of the most an low leave to this and the control of the leave of the like of the like of the control of the control

vinc. To no prote with the constant of the constant service of the service of the service of the constant of t

the cold as the most of the cold and the col

The company

4

LEWIS MYERS,

Appellant,

V.

HEITMAN THUST COMPANY, Appellee. APPHAL FROM SUPERIOR COURT,

209 I.A. 619

MR. JUSTICE FRIEND DELIVERED THE OPENION OF THE COURT.

Lewis Myers filed his complaint in the Superior court against Heitman Trust Company secking to set aside as fraudulent a contract enter d into between the parties June 10, 1952, or, in the alternative, that defendant pay him the face value, with interest, of certain mortgage bonds purchased or received in exchange for stock in defendant corporation; for the removal of defendant as trustee under an indenture of trust securing mortgage bonds owned by plaintiff; for the appointment of a receiver. and other relief. The cause was referred to a master, and twice rereferred, resulting in three separate reports, all finding the equities in favor of plaintiff and accommending the relief prayed. The chancellor sustained exceptions filed by defendant to all the reports and dismissed the bill for want of equity. This appeal followed. Plaintiff, quite aged and too ill to participate in the hearings before the master, died during the pendency of this appeal, and by leave of court the executors of his estate were substituted as parties plaintiff.

The complaint alleged, in substance, that prior to September 22, 1926, Heltman Bond & Mortgage Company was organized as an Illinois corporation and engaged in the bond business; that

glock had nother a

b bibli Miga

.V. TRAINO POURT LANKIUH .eoff.ogg:

en Chomina de la la Calabada. Romana de la Calabada.

NAMES OF STREET OF THE PARTY OF THE OFFICE OF STREET, AND THE OFFICE OF STREET, AND THE OFFICE OF STREET, AND THE OFFICE OF STREET, OF STREET,

Louis types fills from lain the app. ler court turns were no obtain for of publishe quagrate durat newatell temings Control of the contro the standard of the cold will be the think of the contract of the cold of interest, of commenced procedures and an entired in commender to a stock to design the source time to the angle to the stock in the contract of the stock in the contract of the c and the continued to the second and as a few transfer of the transfer and o he in ministry at the control of the and because absent approximate en fr - red - tools .... ormor out - in Line would beer esc Ti sell'i arged. Che showed lier or brown mar bloom the To the sol fill on Consider one upper out Like of the eet bis appear follo ed. Theinvill, on the age in the Milano boib (a. Com one enoted againment of an adagisting of positivey of this spreal, and by law of course the errors of . Militair f. and care on testas in day ones states of the

the completion than 1994 to 1994 the speciment of the second of the second seco

November 30, 1926, it changed its name to Heiman Trust Company, and at the same time became qualified to act at trustee, and since the amendment of its charter it acted as trustee in all its own bond issues; that leptember 22, 1926, plaintiff purchased certain securities from defendant and received from it a letter agreeing that in the event of a default for the period of thirty days in the payment of principal or interest, it would repurchase the securities at par and accrued interest; that thereafter : 28,500 of the bonds matured and upon default defendant repurchased those bonds and paid (13,500 part cash, and on woust 3, 1931, delivered to plaintiff 15,000 bonds of the Lake View Mansions, with a similar repurchase agreement; that in March, 1932, one of the mortgages matured, and upon default and defendant's refusal to comply with its agreement suit was instituted in the municipal court, resulting in a settlement agreement dated June 10, 1932, under the terms of which defendant agreed in criting to may interest semiannually, at 6%, and plaintiff agreed to dismiss the suit and to extend the maturities of the securities at their respective due dates upon payment of interest: that defendent also agreed to repurchase these extended securities in the event of a further default, at par plus interest. It is alleged that defendent refused to comply with its agreement and failed to pay the interest at 6,5, but in one instance tendered interest at 3% and also tendered an extension agreement which required the mortgagor to surrender possession to it and out of the income to pay 3% interest on the securities, with the provision that as long as such interest should as paid there could be no accoleration for a period of five years, and that defendant had the right to use the income to pay itself \$3,275 for commission in

enging on the figure in the contract of the co Secretaria de la desención de la compansión de la compans II. al e e med a la di escia en la la del dende de la constitución de la constitución de la constitución de la Consultation . To the trap of the early appearance of the property forced many as in within to being a first and a first the manner of the thick universe the effective of the self of the self-confidence for the throwing self-self-ungo ក្រុះស្នាក់ ស្ត្រីប្រ នេះ នេះ នេះ នេះ នេះ នេះ នេះ នេះ នេះ មាន សម្រេច នេះ សម្បារ នេះ នេះ នេះ នេះ នេះ នេះ នេះ នេះ The graph of the state of the s The well is a final good to the har air all the transfer being one about within the first the first contribution of the column a figure of the column and ranging and and result to a complete Affiliation in the second and accompanies as a sistence of the state of the second of the rate paint of a common to the control of the contro Moif. To sure a cost of the electric point of the cost of the most above the give the gradition of the state on it known next company of the distance of continuity of companying the distance of To emerge may but a sure when you are in the language and to in the state of th arther inglicated in the refigurable of the second of the second throughtened the in the state of the first to the first to the state of bolish terms - Tipin caracit in redam on commend of the decidant with the day of the model of the contract of the contract of the reduction in add that the education of the trace of the graphs constrain the an long on a month interest on the court of the court in the tem sa demin a seminar and and any or an individual and ampleurs. the solution of the transport of the the dependence of the transport of th

procuring the extension, and also to pay certain defaulted coupons which were subordinated under the settlement agreement; but that plaintiff refused to accept the extension agreement and the reduced interest.

It is also alleged that there was due on the "Drexel" property times for the years 1927, 1928, 1929, 1930, 1931 and 1932, aggregating \$10,110.69, and accrued penalties in the amount of \$3,275.48; that defendant, trustee of the bond issue and in possession of the premises, failed to pay any taxes prior to the application for a receiver under the Skarda act, September 5, 1933; that on the Rifkin property there was due for taxes for the years 1928, 1929, 1930, 1931 and 1932, the aggregate sum of \$3,010.72, plus penalties amounting to \$1,575.17 and special assessments aggregating \$2,805.35; that on the Lake View Mansions there was due the 1930 taxes, in the sum of \$13,529.25, plus 12% penalties, on which there had been paid on account only \$3,827.26, and that the property was sold for nonpayment of special assessments July 15, 1933, and no redemption thereof made; that defendant diverted \$5,682.16 of the income from the Drewel property for its own use, and it is alleged that all these matters were concealed from the plaintiff when the settlement agreement of June 10, 1932, was made, and that if such facts had been revealed plaintiff would never have entered into the settlement. There are charges of gross negligence on the part of defendant to protect the trust properties, the betrayal of its trust duties in the management thereof, the allowance of the forfeitures, sales and penalties, of malfeasance and misfeasance of defendant as trustee, and a prayer for the various items of relief hereinbefore stated.

A motion of defendant to strike the complaint was overruled by the chancellor and thereafter defendant filed its sworn answer admitting the execution of the agreement dated Ceptember 22, 1926, encount to the exploration of the confidence of

efficient to a more exposure execut the Democratic color also a er. I for 1900 today the the 1907, lead, the state of the sol act to the eggregation lang the place of the community of the language of the control of in the made bare and to second and anticipated dark all the postession of the granises, friles so say say that plant is an appliention for a recultyer when the disordarable opening a latter that on the bilities proporty thore you due that the rior the other 1950s 1969 1964 1962 one 1964; Sie ag magest and of the The the arm is a first a bar ThebYS. I had returned a sitting entg as rejecting U.S. 2005. One on wheth he bis 15 a love three war due the 1950 tames, in the wan of lassife. But like at the little. on which there had be a moid on encount only by one and then The process are a letter to demonstrate or the bloss as we will be set and 15, 1950, and so wed marking thereof mades they dear of at divirted 18,632.18 of the iscuse than to tarrel projecty let the out unb, all word bolomers took provider oneld file daily appells at the ban character of the contracte of and to the contracted of the the trace of were the alter This minimum belowers and the oters along the test base entered into the eat. Domant. Name of the of work act. It games on the part of defendant to grotect the true properties, the before The state of the s The Party of the Control of the Cont to the state of th A LOGALITY AND TOPOLOGICAL

and the language and exists of heavening to extreme and do

admitting that it refused to pay the 6% interest alleged, but that it tendered 3%, as well as the extension agreement charged in the complaint; that the status of the properties concerning the tax situation was true; that it became the record owner of the Drexel property and entered into possession by an assignment of rents dated May 1, 1931, and used the income to pay its commission of \$3,500 for the extension. All other allegations of the complaint were denied, and it was averred by way of defense that because defendant was a trust company the agreements of September 22, 1926, of August 3, 1931, and June 10, 1932, were invalid and void, as against public pelicy and prohibited by the "act for the protection of bank depositors."

the master found that the material allegations of the complaint were sustained, that the agreement of June 10, 1932, was valid, that the defense of ultra vires was not available to defendant, and that it was therefore liable on the Rifkin mortgage and on the Drexel bonds, all of which had matured, but was not liable on the Lake View bonds because no interest or principal was then in default; that defendant, trustee under the bond issue of the Drexel apertments, entered into possession under an assignment of rents May 1, 1931, and also became the owner of record by a deed in trust executed about the same time, and out of the income of the property wrongfully applied and diverted to its own use \$3,275 in payment of commission on the proposed extension, to which plaintiff did not consent, and was therefore liable for such diversion.

Subsequent to the filing of the first report defendant presented an amendment to its answer and asked leave to file the same. The amended answer denied that it had on deptember 22, 1926, executed the letter elleged in the complaint, but that a complete

the latter of about 1, 1871, and the constrant of the large line lay long that sing there is a lunch to he had been admitted to the latter of the latter of

Upon he fine of the entry of the course namenant to the trivet refreeded the teat found that the new course of the teather of the teather of the teather of the course of the teather than the teather of the course of the course of the teather than the teather than the course of the teather than th

enbrongent to the Filter of the Circle called an income the Research called the called the called the called the called the the think that the called called the the their called the called called the the their called called called the called called called the called c

the state of the contract of the proof of the state of the state of

contract was entered into in writing on that date, separate and apart from the letter, and that the agreement thus made did not contain any provision regarding the repurchase of the bonds in question nor any guarantee of payment, and that some time thereafter, without any consideration and althout authority, Fred F. Heitman, upon the request of lainter, executed a letter similar in form to that charged in the complaint and shortly thereafter also executed another letter identical therewith except that it was dated some time later than september 22, 1026; that plaintiff or some person for him or on his behalf, for the purpose of making it appear that there was consider tion for the letter so executed by Heitman subsequent to september 22, 1986, filely, fraudulently and muliciously changed and altered the date of said letter and dated it back to September 22, 1926, without the knowledge of defendant or any of its agents, and that defendant first discovered the fraud and deception upon the hearing before the master when the original letter was exhibited for the first time. It was averred that the execution of the alleged agreement dated August 3, 1931, was procured by fraud and misrepresentation in holding out to defendant that the letter of repurchase or quarantee was dated September 22, 1926, when it was actually dated and delivered the subsequent date and without consideration. The chancellor referred to the master for his recommendation the motion for leave to file the an inded answer and while that motion was pending, on June 10, 1935, one Jharles G. Holmberg, filed a petition alleging that he was a stockholder and director of the Heitman Bond & Mortgage Jompany, and its successor, continuously from January 18, 1913, and that his attention had just been called to this proceeding by which plaintiff sought to hold the Heitman Trust Company liable upon an alleged guarantee of bonds; that ne authority was vested in Fred P. Heitman, as president, nor was any

The rest to the field of the last field in the state into the state of extraord and the state of the state of

well the related a law we prison the bound of an area carmeter. THE SECOND OF THE PROPERTY OF A SECOND OF THE SECOND SECON register: In accompanies will be in all refer a in the ment of article being a community to be property three contents are a second and the contents of the contents are contents and the contents are contents are contents and the contents are conte indicame subbodequent in the cate of the late of the consensation of the consensation back to deptember 199, 1.60 ", ad March March 199 A of the day on year to a time agents, and their decirations of acts a tracer of the fire and entropie de la compactación de l not be the same of of the climy decreased to but one to, 1891, a construct to the time. to devi cold a sit on the case on two this fer all neith throughprain bes of more considered or managers of the construction and management to Amma to the description of a second first of the public and or well . And come of the control of the con ing with a first an end of the formulation and the wind main and a while that coston or profiles as box liky his is an inviting . Holmberg, Miled a pathology will exist his over the action red tion of the led the led to the tender of the state of the property of the tender of the coup, and emiliants of the coupling of the continuously and the continuously off Andrea of now which a district of the and the control of being But the to the colors of the c the terminal section of the Paris of the actions of property and the section of authority conferred upon him by the board of sirectors to execute such a guarantee; that Heitman was not authorized to purchase plaintiff's stock, and that the purchase thereof, as well as the a fraud alleged guarantee of the bonds, constituted/upon the other stock-holders and directors, and he prayed that the alleged purchase by defendant of plaintiff's stock be rescinded and the alleged guarantee be set aside as fraudulent and void. The motion to file the intervening petition was also referred to the master for hearing.

Subsequently, July 25, 1935, Heitman Trust Company filed a petition alleging in substance that the board of directors had no knowledge that the gurrantee agreement and subsevent agreements were signed by Fred F. Reitman, and that he acted without authority of the board of effectors, and that newly discovered evidence had since come to the attention of the petitioner (petition signed and verified by howard . . Bishop, duly authorized agent of the Heitman Trust Company and one of its attorneys) that when plaintiff and Fred P. Heitman were negotiating for the purchase and sale of plaintiff's stock, Heitman advised Myers that he would nave to take the matter up with the board of directors, but that Lyers requested him not to do so for fear that they would not consent to it and auggested that they arrange matters between themselves; the newly discovered evidence was characterized as proof of a conspiracy against the corporation, and petitioner prayed that an order be entered directing the master to reopen proofs and vermit the introduction of the newly discovered evidence. This petition was likewise referred to the master, to be considered together with Holuberg's petition and also the motion for heave to amond def indust; answer. The marter altimately recommended that the additional matter introduced by defendant's amended answer be made available as defenses, heard the newly discovered syidence, but found the issues for plaintiff and recommended a decree in his favor, upon the theory that the contract

THE COURT OF AN ACCUPANT OF THE PROPERTY OF THE ACCUPANT OF A CONSTRUCTION OF THE PROPERTY OF

and constitue the characteristic of the constituent published activities of at the way, drawer with the drawer, the first the will take with the principle typ trailing theaf is it for each little has an indiall a lookly ya bomba oxon the second to a terrobal tilluse cold to person all to brace will be She tone a chite, on, less blicky the complement out of smoothing verified by i.e. to the end of the control of the c trait company and one of the center yet to breen into that -mindry to the line of morning old tolemble decompose the anexist at both this was to be with like a color as a way, the allower many but a soon a time? mall and the start of the case of the section is the feet of the start of the case of the section is You are the first a war and the best of the training the training on on or tonoridance as all good misses of the ready of the interest of the birds that make I have do been not for the train middle but their seeds The contract to trooper product on very the introduction of testing vily eaf; is a soi to go book define fit or naviget out bicket of et ; tebuch the method restlement to the state of the state of the state of the where the property and the control of the state of the second of the second sec when a odd wound to make the blank of the od the control of the Alsooviid 1982 noo, har a dan the itemater 10 gl Anthrope to a

Summary of the state of the state of the state of a behavior

of June 10, 1932, constituted a settlement between the parties, and also reconnecided that Molmberg's intervening perition be dismissed for want of equity.

The essential facts disclose that Lewis Myers had for many years been a stockholder and director of Heitman Bond & Mertgage Company, engaged in the purchase and sale of mortgage bonds. The by-laws of the corporation provided that in the event of the sale of any of the capital stock by any stockholder he was required first to offer it for sale to the company at its book value according to the audit of the preceding year. Accordingly, in July, 1926, negotiations were inaugurated by plaintiff for the sale of his stock to the corporation, which culminated in the proposal and acceptance dated Deptember 22, 1926, by which the company purchased from plaintiff his 404 shares of stock at \$286 a share. The offer and coeptance by which this sale was consummated (hereinafter referred to as stock sales agreement) is as follows:

\*September 22, 1926.

Heitman Bond & Mortgage Company, 10 South La Salle Street, Chicago, Illinois.

## Gentlemen:

- I hereby propose to sell to you four hundred and four (404) shares of the Capital took of your Company at a price of \$286 upon the following terms and conditions:
- 1. I propose to sell at once and deliver to you herewith two hundred four (204) shares of said stock.
- 2. I further propose to sell to you on January 3, 1927, the additional two hundred (200) shares.
- 3. The purchase price of said two hundred four (204) shares amounting to 53,344, I agree to accept in Drexel Mansions first mortgage bonds amounting to leven housand believe (11,00), Rifkin & Epstein first mortgage Twelve Thousand Five dundred Dollars (12,500), ureka partments first mortgage bonds amounting to Thirty Four Thousand Five Hundred Dollars (34,500), and the remaining Three Hundred and Forty Four dollars (344) to be adjusted upon accrued interest and the difference paid in cash.

ength is eith open a of ancestalling in the double and thought and the war open a constitution of the cons

The entropy of the control of the co

ı, Ğ

Heltman Rond & Nert page Cangery, 10 legth in 1911: 11 - 15 White my Militaria.

: Bone Edno

4 10 10 10

und's this he found their met, of this ester emerging years in (2004) as well in south (2004) and the south (2004)

le de par per proper de la lace de lace de la lace de la lace de la lace de la lace de l

the constraints amongone by a LA so you on do not; as LMTV, the constraints of a man a region of the constraints.

(a) The second of the second o

4. In payment of the Two Hundred (200) shares, the purchase price of which is (57,200, to be delivered January 3, 1927, I agree to accept in Drexel Mansions bonds amounting to (57,000, the difference of Two Hundred Pollars (4200) to be adjusted upon accrued interest.

In connection with these Two Hundred shares (200) I agree to deposit the same in escrow with the Foreman Trust & Savings Bank and you to deposit said Brexel Mansions bonds amounting to Fifty Seven Thousand dollars (57,000) with Foreman Trust & Savings Bank in escrow with instructions to Foreman Trust & Savings Bank to deliver said stock to you on January 3rd, 1927, and to deliver said bonds to me on said date.

I hereby waive any right that I may have to purchase back this stock and I hereby waive any right that I may have to purchase any stock of your Company in the future, in accordance with the agreement shown by the by-laws at the time the capital stock of your Company was increased, and all my rights under said by-laws to purchase stock in your Company I hereby release and waive.

6. I further agree that my voting rights in the stock covering this proposal shall cease forthwith.

Very truly yours, (Signed) Lewis Myers

Accepted: Heitman Bond & Mortgage Company

By (Signed) Fred P. Heitman President."

The Heitman Bond & Mortgage Company resold these shares to various of its directors, including Philip C. Lindgren, Fred P. Heitman, Walter E. Olson, Charles G. Holmberg and Howard F. Bishop, who paid the company in cash at the rate of \$286 a share, except 25 shares which were sold to Adolph O. Martmann at a profit on the basis of \$300 a share. The company thus received the cash for the shares of stock, and paid for them in real estate bonds and mortgages which it then owned.

There was introduced in evidence at the hearing before the master another agreement (hereinafter referred to as the first guarantee agreement) dated September 22, 1926, as follows:

"Sept. 22, 1926.

Mr. Lewis Myers, Chicago Beach Hotel, 1600 Hyde Park Blvd., Chicago. A. In representation of the Presentation of the Presentation of the contract o junted committees and information

R (. 18) a. ... in the control of the activation and the control of or the control of the contro

and left, and to this was about the bas of the first

standard of specific tell of the Mil sylve given i el volve to the selection was the collection from the selection and show a mil tell selection was to the selection of the selection of the Each present of the selection of the selection of the selection of the selection of the tell of the selection of the s . ovlow bus

offered the file of all the specifiers and their stages went with I . . O 100 TO THE RESERVE TO

anomi an en pagin j

By (Magnet) Fred . . Long ... 4

The Heitman Bond & Mombray a dompany masche there alegree to radious of the directors, includio Fallip to Lindyper, Macc. . . Litrais

Walter T. Clumn, the right of Rolenburg and Found I. . Thought .

paid the commany in orall wi that or to of 1226 a phane, apart AB

the second secon one so what a control of a court are all a second to control of the characters and the control of the control o

Thing we will be a discount of the control of the party of the party of the control of the contr

The second secon

mostur another agreemant (heneiner) see reten to a char and the confidence of the first of the first list 1856, so including

a temporal limits yell eliabeth to the second **4** 1

s contract the state

Dear Mr. Myers:

On account of your having purchased the following:
Drexel Mansions Bonds Nos. 10/14, 16/18,
24/53. 56/80, 81/153 \$68,000
M. Rifkin, et al. mtg. No. 2494 12,500
Jureka Apartments, No. 17/85 34,500

it is agreed between the Heitman Bank & Mortgage Company and yourself that should there be a default of principal or interest, and said default continues for thirty (30) days, during the life of the mortgage on the above properties, we agree to purchase the above said securities at par and accrued interest after the thirty (30) days have clapsed.

Likewise in connection with said purchase we have adjusted the interest and there will be due you in cash on January 3rd, 1927, the sum of \$580, which sum we agree to pay you on that date.

Very truly yours, Heitman Bond & Mortgage Company By F. P. Heitman, President.\*

It was defendant's contention that this contract was entered into subsequent to beptember 22, 1926, and deted back, either by plaintiff or by some one on his behalf so as to make it appear that the stock sales agreement and this guarantee agreement were concurrently executed; that the stock sales agreement contained no provision for repurchase or guarantee of the bonds received by plaintiff in exchange for his stock in the company, and by rear on or that fact ne consideration appeared in the guarantee agreement which defendant says was subsequently executed, for the repurchase of these securities: and that in order to furnish a consideration the dete of the second agreement was altered to make it appear that the two contracts had been made at the same time, and the guarantee of the bonds furnished a consideration for accepting them in exchange for the stock. Twidence was introduced pro and con on the question of alteration, and it appears from the original document, which was introduced in evidence and brought here as an exhibit, that some alteration was made in the "22" following "September" and proceding \*1926". The master found that there was an alteration, but there is no convincing evidence that plaintiff fraudulently changed the

racest. • di sesti

TO THE STATE OF THE MESSAGE AND ASSOCIATED BELLEVISION OF THE STATE OF

it is egreed between the Milarn Suik I woth, in the may not the many on the many on the many of the composition in the many of the composition of the composity of the composition of the composition of the composition of th

likewise in connection with sail yourshad to have an jourst the interpret of the connection of the connection of the connecty first and the connecty first are one of the , high are at the connection of the , high are at the connection of the conn

The second secon

na mah standas (12 mani banihis

~ಕಷ್ಟುತ್ತಿದ್ದಾರ್. ಇದ್ದರೆ ಎಂದು ಕ್ರಮಿಸಿಗಳು ಕ್ರಮಿಸಿಗಳು ಕ್ರಮಿಸಿದ್ದರೆ ಕ್ರಮಿಸಿದ್ದರೆ. ಇದರ ಕ್ರಮಿಸಿದ್ದರೆ ಕ್ರಮಿಸಿದ್ದರೆ ಕ til av by same one en his bok di so as to miss it the miss it that -time in the mean include the contraction and the meaning and a state of the state Ly executed; the the end and and and the hard of the The repurchase or quecentee of the bonds received by plaintillia in constructed for his ricar in the acapacy, and by we can can be into -br led delet de mora e ostran u , eds ni bouncean noiterabience ex ent aire in aubecinentir executed, for she r purchase o. A ... scount thees and that in order to immish a constitute that the dis-Car tail to the water at the most of horself and decomposite the same off to contracts had been made at the count time, and the emember of the band. furnished a con Adem tion for a serpting them in a circle with the ext. no man how one decembers in our commotive answer end to of alterestion, and it a magnet lyon Who orligion's course at, which an introduced in tridence ent brought has one ended its, the term olkborethen was nade in the die of Tollowing "Stylle and stylle in the country of "ISAG", The marker found that there was an alteredien, but thepr

Charles of Supplied the Company of t

date, and it was his counsel's contention that it was altered with the full knowledge and consent of Fred 2. Heitman.

A third somtract was entered into between the parties September 23, 1926, which is identical with the so-called altered agreement, except that it does not contain the last paragraph relating to an adjustment of interest which was to become one January 3, 1927, and under which defendant agreed to pay plaintiff \$580.

August 3, 1931, defendant wrote a latter addressed to Lewis
Myers and his wife, Lizzie Myers, as follows:
"Dear Sir & Madam:

In consideration of your having turned in the Eureka Apartments Bonds in the agregate amount of 28,50, and having accepted in full lieu of each the sum of 11,60, and sorved interest in each, and thirty bonds, to-wit: No. 160 to 169, both inclusive, and No. 306 to 325 both inclusive, of the lake View Mansions, each of seld bonds being for the sum of 500, in the aggregate of 15,000, and executed by John tone, a backely, it is hereby agreed between the third heitman Trust Company and yourselves that should there be a default in principal or interest on any of said lake View Mansions Bonds and said default continues for thirty days, during the life of the mertage on said property covered by said bonds, as agree to purchase the said bonds from you at par and corued interest after the thirty days have classed.

Yours very truly,

Reitman Trust Company,

By Fred P. Heitman (Signed)

President."

In Movember, 1931, Myers instituted buit a plant the Meitman Trust Company, whose name had since been changed and its shoter amended so as to enable it to not as trustes, alleging a breach by defendant of the so-called altered agreement of Deptember 22, 1906, in the total had failed to repurchase out in accurition on which defaults had occurred. hile this suit was pending plaintiff and defendant entered into an agreement, dated June 10, 1932, which plaintiff charged in his complaint was procured by fraud and which defendant says was made althout athorization of the corporation and in violation at its charter powers and was therefore ultra viras.

en groupe general en la follogen de la companya de la co

and the second of the second o

The state of the s

. We die . In going oil . In gold aid him angre-

in was first inst

in someth medical properties of the second solution of the second solution of the second solution of the second solution solution solution solution solutions.

Charles (Charles )

Managhing and Country of the control of the control of the control of the country of the country

The master found that the agreement was fairly entered into, that it was a settlement of the controversies then existing between plaintiff and defendant, and that it was not ultra vires. The agreement is rether lengthy, but since it is the principal subject matter of the controversy between the parties we set it forth in full, as follows:

"This agreement, made and entered into this 10th day of June, A. D. 1932, by and between Heitman Trust Company, a corporation, with its principal offices in the City of Chicago, State of Illinois, and Lewis Myers, of the City of Chicago, County of Cook and State of Illinois.

## Witnesseth:

Whereas, there is now pending in the Municipal Court of the City of Chicago a suit wherein Lewis Myers is plaintiff and Heitman Trust lompany, a co-poration, is defendant, involving a certain agreement between the said parties, dated extender 27, 1926, covering certain beads and a certain mortgage alleged to be held and owned by the said Lewis Myers, and

Whereas, the parties hereto have had certain controversies and disputes as to claims due and owing the said Levis Tyers from the said Reitman Trust Company, arising out of the said agreement, and

Whereas, the said Heitman Trust Company and Lewis Myers are desirous of settling all of such claims, controversies, disputes and litigation between them,

Now, Therefore, for and in consideration of the premises aforesaid and for and in consideration of the sum of One Dollar (1.00) and other good and valuable considerations by each to the other paid, receipt and sufficiency whereof is hereby acknowledged by each, together with the mutual covenants hereinafter contained, it is mutually agreed as follows:

1. Heitman Trust Company will pay to Lewis Myers out of the moneys now on hand arising out of the hifkin mortgage, and if there be no moneys on hand arising therefrom, then it will purchase, from its own funds, from the said Lewis Myers, all interest coupons and pay all interest specifically, described as follows:

Trust Deed made by Morris Rifkin and Jennie Rifkin, his wife, and Morris David .pstein and Pannie Epstein, his wife, to Chicago Title and Trust Chapany, a corpor tion, as Trustee, conteying the following described property:

Lots Twenty-one (21), Twenty-two (22) and Twenty-three (25) in Block Two (2) in Albert F. Kenney's Belmont Rome Gradens, being a subdivision of Lot live in Ring and Patterson's ublivition of the Northeast warter (NE 1/4) of Section Twenty-nine (29), Tourship Forty (40) North, Large Thirteen (13), East of the Third Principal Meridian, in Cook County, Illinois;

From the second of the control of the control of the control of the control of the second of the control of the

The eposition of a few and the enterior of the

## 1.56 3.1. 1211

increas, there in toot as wind to the leafuled forms of the listed forms of the lister of the lister

and an even mean selection of a very one week consisting only cannot distention of any location of the consisting and any and the business of the section of the section

Cherency the cold Holman Company and Lowis Lyans one desires of section of a shake of a site of section of a shake of the section between them.

Now, There would be able to be the complete and the promise at the promise and the promise and the promise and the promise and the complete an

1. Heliman Dunt o among bill may to be an included on of the control on of the control of the co

True to the control of the control of the first term of the control of the contro

in Mlock two (2) in . Nourt M. de aspts "climont None dredunt selection of the data of the last concept of the last concept of the last of the month of the last (20), and the last of the last (20), and the last of the last

said loan being dated September 1, 1926, and due by its terms on September 1, 1931, in the total sum of \$12,500.

- 2. If, however, and solely in the discretion of the said Heitman Trust Company it can make satisfactory arrangements with the owners of the equity of the Mifkin property hereinabove described, then, upon request of the said Trust Company, the said Lewis Myers agrees to extend the principal payment of said Fifkin mortgage in the sum of 12,500 for a period of three years from May 16, 1932, to May 16, 1935, upon the terms that interest shall be payable upon said loan semiannually, as heretofore, and upon the same terms and conditions as to all other covenants and agreements, as set forth in the said Rifkin trust deed hereinbefore described. Provided, however, that the interest now past due is either paid to or purchased from the said Lewis Myers by the Heitman Trust Company, as provided in Paragraph lirst herein. It is agreed that upon the payment of any interest notes representing the said interest due or to become due, the said notes shall be cancelled and marked paid and that in connection with said Mifkin mortgage, any payments or purchases hereto ore made by the said Heitman Trust Company shall be subordinated to the balance of the 12,500 which shall be extended and the notes so held by the frust Company shall be clearly marked to indicate said subordination.
- 3. Said Lewis Myers further agrees that if the present owners of the equity of redemption described in said trust deed known as the Rifkin mortgage do not make some adjustment satisfactory in the sole discretion of the Heitman Trust Company, that he will deliver to the Heitman frust Company, upon its trust receipt, all of the securities and trust deed representing the said Rifkin loan for the purposes of forcelosure by the said Heitman Trust Company, at its own expense, however, and that the said Lewis Myers will assign, without any cost to the said Heitman Trust Company, or its nominee, all his right, title and interest in and to the foreclosure proceedings now pending in the Circuit Court of wook County, Illinois, under the title of Lewis Myers vs. Nifkin, et al., No. B-232349, so that the Heitman Trust Company, or its nominee, may proceed with said foreclesure proceedings to its final culmination, with the understanding, however, that said foreclosure proceedings should be for the benefit of the said Lewis Myers only until such time as the said Rifkin mortgage shall have been substituted with other securities by the said Heitman Trust Company, as hereinafter provided, and that upon the substitution of the securities representing the said Rifkin Loan, the said foreclosure proceedings, together with the securities thereby represented and/or the propertyforeclosed upon shall become the sole and exclusive property of the Weitman Trust Company.

Said Lewis Myers further agrees to assign to Heitman Trust Company all of his right, title and interest in and to the judgment by confession obtained in the Municipal Court of the City of Chicago, in the case of Myers v. Mirkin, et al., so. 2750016, which said judgment was obtained on sevember 5, 1931, together with all of his right, title and interest in and to the carnishment judgment therein, now pending against the Liberty Trust and Lavings Bank and the appeal thereon. It is understood, however, that in all of the assignments of the foreclosure, judgment and appeal, that the Heitman Trust Company shall not be liable for attorney's fees or court costs and expenses heretofore incurred and which have accrued or have been expended by the said Lewis Myers, or by anyone in his behalf, on said lawsuits or foreclosures prior to the time of the said assignment. Such assignments of the foreclosure proceedings and the

andd long Deing drawt saptumber ly lind, and the being on legitember ly livily to the secret on

Heltman Truct domesty it down it he risercation of and a list content fall and the riser domesty it down it he riser and the received, then, upon revers the risk in the received, then, upon revers the risk in the received and received the received and risk in the received and received the received and r

through wit it the seen; worken are all all the . & been that bit all bedicens sold with lo vilue and le avenue guode Talifor anerdari, . One . whom ton o', saryther mixth off as arend in the sole discretion of the daily out there were seed he will the testiment dames of the company that the free of the contine of the speurities and truet cond representing the rais tilkin loop tor the purposes of fereal action of the . If I have freet longuars Lil resp. stock bases the child old or tree of teams of market it. At the contract of the cont comince, all his right, title and interest in and to the forcellance proce sings now pension in the direct of our founty, Million, under the title of let i grammer, diffin, at it, to the property on the the feathers the contract the feathers the contract the feathers the contract the contrac that the Medtenan Trust Jangour, of its chisse, by roce this religious proceedings to the Mist avising Un, ith te restored ar in , however, the to identical process in a limit be for the bir: sail or said form. Elegar tino every labout bire end lo silvano midition mortgrame simil have been substituted. Ath other meanth ties by the world feitman stands ourgains, he have been brown or as the upon the substitution of the sentition reconsists the chanter with Donn, the neid Terralogues proceedings, lagsyner with the courtlies thereby represents densifier the property order to wood the latter of The cale and conductive property of the third term of the cale of

 judgments aforesaid shall be made upon the understancing and agreement of the said Heitman Trust Company that it will pay to the said Lewis Myers all semiannual interest due under the terms of said mortgage, the same as if it were extended during said period of foreclosure and provided, further, that upon the issuance of a Master's Certificate of Sale and a Master's need thereon to the said premises, the said Heitman Trust Company shall substitute in exchange for the Rifkin Mortgage and/or trust receipt hereinbefore mentioned other 6% bonds or mortgages issued through or owned by the said Heitman trust Company, which said substituted bonds or mortgages shall then be in good standing and not in default and small be to the reasonable satisfaction of the said Lewis Myers.

Upon the assignment of the said foreclosure and judgments hereinabove described, the said Lewis Lyers further agrees to execute a direction to the straus flational Bank and Trust Company to turn over possession of the premises hereinabove described to the Heitman Trust Company, or its nominee, without any cost or expense to the said Heitman Trust Company, together with the further direction to the Straus Mational Bank and Trust Company to turn over to the said Heitman Trust Company all funds or moneys collected by it and held from the premises hereinabove described.

4. Heitman Trust Company further agrees that in the event the said Rifkin mortgage is substituted, as hereinabove provided, with other bonds or mortgages, as aforesaid, the principal sum of the substituted mortgages or bonds shall not become due or payable at a date later than three years from the date of the substitution, unless the said Lewis Myers shall agree to such later date, and the Trust Company agrees to pay or purchase all bonds or mortgages, substituted for the said Rifkin mortgage upon default in the payment of principal or interest on said substituted bonds or mortgages, and such default continuing for thirty days, but the said Trust Company shall not be required to so pay or purchase said substituted securities until thirty days shall have elapsed after said due dates.

Provided, also, that in the event the said Heitman Trust Company fails or refuses to pay or purchase the substituted bonds or mortgages hereinabove mentioned upon their default in principal or interest, as the case may be, then the said Lewis Hyers shall have the right to tender to the said Heitman Trust Company the entire 12,500 of substituted bonds or mortgages and the said Heitman Trust Company shall thereupon become obligated to pay or purchase the entire 12,500 of said substituted paper.

5. Heitman Trust Company further agrees to pay out of the funds deposited with it, or if no funds are deposited with it on the due dates, then said Heitman frust Company agrees to purch se all interest coupons maturing on arexel Mansions and Nos. 45 to 55, both inclusive, 56 to 75, both inclusive, and the said Heitman Trust Company hereby further agrees to pay out of the funds deposited with it for the purpose, or if no funds are so deposited with it on the due date, then to purchase from the said Lewis Myers all of the above Drexel Mansion bonds maturing by their terms on May 1, 1932, and revember 1, 1932, provided, however, that upon the maturity of the remainder of said Drexel Mansions bonds on May 1, 1933, said Lewis Myers and or Lizzie Lyers, his wife, their heirs, executors or assigns, shall agree to do and de he sby agree to extend the remainder of said bonds then unpaid for a period of five years from May 1, 1933.

Then the continuent in the self of the self industrial court with the self indication of the self the

4. Neither the substitute of manage routings of meet the second of the size of the size of the substitute of the substitute of the size of the substitute of the size of the s

Provided, whee, the the true to the true of the true was tellered wright Company I allo or Tures to only or Tures to only or Tures to only or Tures to only or Tures to the true of true of the true of true of the true of th

Is defined from the company of the compact of pay out of the funds deposited what is, or if no imade or consideration it of the first or consideration from the compact of the consideration of the co

It is understood that upon the payment of any interest coupons attached to said Drexel Mansions bonds, said e upons shall be stamped paid and cancelled.

During said extension period of five years from May 1, 1933, the said Heitman Trust Company agrees to pay or purchase any or all interest coupons as the same mature, if not otherwise paid, and that upon the due date of the said Drexel Mansions bonds by the terms of said extension agreement, said bonds shall not be paid, then s id Heitman Trust Company agrees to purchase said bonds from the said Lewis Myers, or to substitute in place thereof, other bonds or mortgages issued or owned by the said Heitman Trust Company, which bonds or mortgages used as a substitute shall then be in good standing, not in default, and shall be to the reasonable satisfaction of the said Lewis Myers. The said Heitman Trust Company likewise agrees to pay or purchase any of the substituted bonds or mortgages after the same shall have been in default for a period of thirty days.

- 6. It is further agreed that all payments and/or purchases to be made shall be at par and any interest payments not made when and at the times required to be made shall draw interest after maturity at the highest rate at which it is lawful to contract, except, however, the Rifkin mortgage hereinabove described, upon which mortgage interest at the rate of 6% only shall be payable from the date of its maturity, to-wit, September 1, 1931.
- 7. It is further agreed that in the event default is made by the Heitman Trust Company in the substitution, purchase or payment of any of the securities hereinabove mentioned, and it then becomes necessary for the said Lewis Myers to file a bill to foreclose upon said securities for the purposes of protecting his interests thereunder, then and in such case only, the securities purchased or paid by the Heitman Trust Company of that issue foreclosed, theretofore, shall be subordinated to the securities owned by the said Lewis Myers and upon which that foreclosure shall be based.
- 8. The right is reserved in this agreement to the Heitman Trust Company to purchase any or all of the securities hereinabove mentioned, or any or all of the securities substituted therefor, upon payment to the said Lewis Myers of cash for said securities at par, plus accrued interest, upon giving to the said Lewis Myers thirty (30) days' prior notice of said intention to purchase.
- 9. It is also agreed that wherever the words 'Trust Company' appear herein, it shall be considered to include successor or successors, and that this agreement shall be binding also upon the heirs, executors, administrators, and/or trustees of the said Lewis Myers, but shall not extend to his assigns.

In witness whereof, Heitman Trust Company has caused this instrument to be executed by its President and fecretary and its corporate seal to be hereunto attached, and the said Lewis Myers has hereunto affixed his hand and seal the day and year first hereinabove written.

Heitman Trust Company By: F. P. Heitman, Pres.

(Seal)
Attest:
Philip C. Lindgren, Secy.
Lewis Myers (Seal)

Is in mai the bold of a second of the second

entered to the content of the conten

6. It is finables our to the tell product of the product of product of the tell of the product o

V. It is the Mark Target Company of the control of the control of the transfer of the company of the mark the Mark Target of the control of t

8. The wight is well with in the second is the consist of the first company to purchase the case of the consistion benefit of the consistion of the consisting consistion of the consistion of the consisting c

6. It is also a-ward wind throwever the toach throat of ampacy! appear hereing is the limit of the control of the limit of a ampacy! appear hereing the time of the height of the height of the height of the control of the limit of the height of the control of the limit of the lim

The will be used the continuation of the conti

gasage O diam de lessed fin il

. . . . incgroup, scope

(De: J.)"

When the Mifkin mortgage was defaulted in August, 1931, defendent failed to comply with its guarantee agreement of September 22, 1926, by which it had undertaken to repurchase the defaulted issues at par plus accrued interest. Accordingly. plaintiff instituted suit in the municipal court to recover the (12,300 and interest due on Longs held by plainting. This cuit was settled by the fore cin agreement of June 10. 1932. The Drexel bonds matured may 1, 193. hortly there fter defendant presented to deintill for his approval a form of agreement extending the bonds, in the sum of 168,500, from May 1, 1933, to May 1, 1938, with interest at 3% instead of 5%. hen plaintiff refused to consent to the extension upon the terms suggested, defendant failed to pay the principal of the bonds which had motured May 1, 1933, aggregating \$46,500, and also the interest that subsequently fell due November 1, 1933. However, immediately after the execution of the settlement agreement of June 10, 1932, Jefundant paid plaintiff [4,486.74 on the Drexel bonds and lso paid the accrued interest on the Fifkin mortgage. At the same time plaintiff assigned to defendant all his interest in the mirkin mortgage, the judgment, his interest in the carnishment suit, and permitted attorneys for defendant to be substituted in the mirkin foreclosure processing. Thereafter defendant prosecuted the foreclosure suit to the point where the master had filed his report in October, 1973, but no dearce was ever entered.

Defendant takes the position that the first guarantee agreement of September 22, 1926, was executed subsequent to the stock purchase agreement bearing the same date, and that there are no consideration for the undertaking to repurchase or an rantee the bonds given plaintiff in exchange for his stock. A careful reading of the contract of June 10, 1932, discloses the fallacy of this conten-

e. The grant of the first of th Carried and a second of the contract of the co ្សាស្រី សមានកំពុសក្រុម ក្រុម ក្រុម ការប្រធានការបាន សេច ប៉ុន្តែ ស្រាប់ ស្រាប់ ស្រាប់ សេច សេច សេច សេច និយាសាធិបស and the second of the second continues of the second c The star of the star of the star while the service of the section of the THE ACOUST A MINE OF CHAIN AND THE RESERVE AND the ment and the land one opinions of the land of the care above the mode. #Ome@of to leave of the control of रा भूम १०० हा १८७६, १०७६ १०७० १०७० हो है। किए एक एक समेरी का १४४४वर्ग पढ़िए स्थाप in to the desiration of the contract of the co The second secon of the standard of the same and the factories and goe of bealth. THE RESERVE OF THE PARTY OF THE Poll date investment by differ. The eventy from Tetra a said or the entermitted · tri ndi. Tiding domina G. N. (2005) (id ne tri G. Domina surp ii durandatas udd do fourthers a learning and likely not the endough district this no it had, it this on the "illian and the ere to the court of the color of the addition and the cofendant the first table is the first that the state of the day and the to. I have individues was goings around here and all assential aid · will recommon ormans where of T. . The common words is due to the broken by There are not the ever of the rate of the second of the second of the second shere the swirter is the like of themes as each my Mary in the and hided toto and person

endradens to the company of the chiral chiral chiral chiral managements of the chiral chiral

tion, because in that agreement plaintiff gave some rights, including a judgment in the municipal court, the garnishment praceeding and his right to foreclose the Rifkin mortgage. All of these were valuable rights, and constituted a sufficient consideration for the agreement of June 10, 1932. Whether or not the contract of September 22, 1926, was of itself supported by a good consideration, the subsequent agreement and partial payments thereunder superseded all the former transactions.

Defendant's answer to the original complaint interposed only the defense of ultra vires. Obviously this was not a good defense, as the master held, because in September, 1926, when the transactions in controversy were initiated, defendant was incorporated under the name of Heitman Bond & Mortgage Company, and was engaged solely in the purchase and sale of bonds and was enabled under its charter and under the statute to repurchase its own bonds. The defense of ultra vires was supplemented by averments that Fred P. Heitman was not authorized by the corporation to purchase plaintiff's stock, nor to guarantee the payment of bonds given in exchange for the stock, and the defense of ultra vires was renewed upon the theory that subsequent to September 22, 1926, the name of the corporation had been changed to Heitman Trust Company and its charter amended so as to permit it to act as trustee, and it is then claimed that under the theory of Knass v. Madison & Kedzie State Bank, 354 Ill. 554, it is against public policy for the trust company to agree to repurchase its own bonds. It is argued that since the agreements of September 22 and 23, 1926, and the letter of august 3, 1931, were issued without authority of the corporation and in derogation of its powers as a trust company, the contract of June 10, 1932, which purports to settle the transactions covered by the earlier agreements, was also invalid and unenforcible. Under the

THE CONSTRUCT OF THE CO

tokominati ami ilgano ilaminiko tak ot metrok elakubusisti her, a for sea will the same . This will be amount of east the defences as the earthraphic C sense in a mace as the entra set as the trong of the and the control of the the the the the the the trongnow one the time to the court of the transfer of the setting of the setting engaged solely in the permit as no also of the one case in a curbine under it to chartes and under the attack of a contract of the man atronomovo, va bodo en leggad to gently extig de eams to entre estada that Fred F. Meltman our not enthorized by the conferrates to purchase plaintiff's stock, for to the persons of bords was partly apply to the charteness, the cole and the cole and the cole renewed upon the throwy that, a restrict of the court of the letter than Transport to the company to the temperature of the most configuration of the company and its charter amonded on a congress to the cotton at the construction, at Low Burnish .v (1994) to the other the bould of bould ment at the terms of and mail posts, and the contract of t with possible and the the true to our learness of cases of the city Times the speciments of Juptembur for and La, lind, out the labor of the act there is no a faction at the continue of the second state of the second મામ 100, 1938, અલાકાર મામા ૧૯૬૬ કરા ૧૯૬૬૧૯ લેકા છે. તે મામા ૧૦૦ કે મામા particular states and particular states and

Knass case it was held that an agreement by a bank to repurchase at a specified price mortgage bonds sold by it is not within the scope of a general banking business, as that term is commonly used, and that guarantecing such bonds is not within the powers conferred on banks by the banking act nor a necessiry incident to the powers granted. The decision rests upon the theory that for the protection of bank depositors, as such, an agreement to repurchase may jeopardize or impair the deposits of the bank, resulting in injury to the depositors and the public. The decision is clearly not applicable to the character of the business transacted by Heitman Bond & Mortgage Company, the predecessor of defendant, nor to the Heitman Trust Company, which was not engaged in the banking business. All the transactions out of which this controversy arose preceded the change of the corporation to the Heitman Trust Company, and the amendment of its charter, and therefore its authority to do the various things which defendant contends were ultra vires date back to the original corporation. Moreover, we perceive no reason why a trust company may not settle a litigated matter by agreeing to pay with securities it owns and guarantee the payment of such securities. Counsel for defendant concede that it may do so, but argue that the ultra vires acts arose through agreement of the trust company to pay at maturity the obligations of other persons. The principle which forbids banks to do this is based upon the policy of the law which does not permit deposits of a bank to be jeopardized by such undertaking, but the Heitman Trust Company was not a bank and therefore, in our opinion, the rule of law invoked is not applicable to the circumstances of this case.

Sec. 4 man act for the protection of bank depositors, method (chap. 38, par. 64, p. 1119, Smith-Hurd Revised Statutes, 1935) cited in the Knass case, reads as follows:

"Sec. 4. It shall not be lawful for any savings bank, individual or individuals doing banking business, banking

ent with a real total total the country or dues reing beilde de de estate that one is the first of the contaction making formers, is to soon somether content of a lifety con of the filter patiest compatible grantes. Who dielet we no do not not the lineary this first that the grothestica -ting in your one doing is to trace sty one element at extractly one bodies to Made of three the ties of the file of the anits at addition the entire volume - Right of the type the term of the control of the self of all the the the three two controls of the almost a formation of the besides the means to the think a formation of the test of range dampang, the gradestes or of definite as, nor to the grainess and Commany, Thich we not carry to the the the tendent bustances to the transportation of this to be a compared the same provided the same provided the same and the sam Carrieras out for egacy. o that constitute of entirengues out to winist again where of addition the country that the object of the Indiana and as in a specification was come and two ambitions delica wes in heps from a sp. sparen hi sylusta. An esucall kmaidesactas all provinces will ger of parisonals to read a lost givin a eliter den over ted junitaries fine july ted to teda to teda king kun kanal dan eef ee ont concode that he way on as, but a gas his a the party wines no me or affine which a fall with a live or buy soil a second a wait of a colsection tivate our condition and I also its modifier out that sid out to this confidence of the About the first of the side of the side of

the second second second second second second

go Ty vandi terr n divel the modes these and not den market see

elle di grittes y. Let Ist I od den ilede di 45 400."

company, or incorporated bank ric iving a vings asposit, or deposits of trust funds, to assume the payment of, or to become liable for, or to parentee to parentee to parentee of indeptedness of, for, or on account of any person or persons, company or incorporation; and in any assumption, liability or austantee, whereby such deposits or trust funds could be jeoperdised or lapsing shall be null and void."

In our opinion the only institution entitled to the protetion of this section is one doing a banding business, and not serely a trust company. The distinction between the two is clearly shown in 7 Corpus Juris 881, sec. 970, as follows:

"The distinction between a bank and a trust company is well defined. The powers of the trust company depend on the terms of its charter, of course, but they are not banking powers. The trust commany, like the savings bank, pays interit on deposits, but its a posits are strictly loans, not subject to check. It cannot issue its own notes for circulation, nor does it buy or sell exchange in the ordinary course of its declings. In directions that are not akin to banking, its powers are much broader and extend outside the monetary realm into real estate transactions, trusteeships, and the conduct of property interests of all kinds. The exercise by a trust company of some of the functions of a bank does not make the company a banking institution nor lay its officers liable to prosecution for violating the banking laws."

The defense that Heitman was not authorized to make these various agreements, and that the transactions were not approved by the directors, are not sustained by the record. Under the by-laws, as smended, Heitman was empowered to "perform the usual duties pertaining to such of floors in cimilar mercantile corporations," and it was specifically provided that any stockholder dealing to sell his stock had to first offer the same for sale to the corporation at the book value as shown by the audit for the proceding year. We think this provision empowered Heitman to enter into an agreement for the purchase of plaintiff's stock and to provide the assume of payment. It appears from the evidence that Heitman of the first off the total capital stock of the corporation, and that he and Linegren "practically ran the business in all its details," and that the directors "left matters of contracts and business man amount up to them." In addition to these circumstances five of the directors

No unite to to the a traction of the second of the first selection and all second of the second of t

The series of th

THE CONTROL OF THE CO

purchased plaintiff's stock after the corporation had acquired the same, and they must have known that it was part of the stock purchased from plaintiff and acquiesced in the transaction.

Through the various transactions between these parties plainti f parted with 404 shares of his stock in the Heitman Bond & Mortgage Company, which was at the time a prosperous concern. Under his steck sales agreement he was entitled to receive cash according to the by-laws of the corporation. He was given bonds which were guaranteed in the subsequent agreement. hether the so-called altered agreement was made currently with the stors sales agreement, or not, it is certain that they were both made in September, 1926, and we are convinced that these two contracts, as well as the agreement of September 23, 1926, were part of the same transaction. If any alterations were made in the second agreement it was not a fraudulent alteration but one of which Fred P. Heitman had full knowledge and to which he acquiesced. It stands to reason that since plaintiff, being entitled to cash for the sale of his stock, would not have accepted bonds without some kind of a guarantee that the bonds would ultimately be paid,/ that is precisely what Heitman Bond & Mortgage Company, and later the Heitman Trust Company, undertook to do. It received 286 in cash for each of the shares except 25, for which it received \$300, representing a profit. The result reched by dismissing complainant's bill would be manifestly inequitable and unjust, and would leave defendant in the position of having received cash for the stock which it had acquired from plaintiff and having given him some worthless bonds in exchange for stock in the corporation, which was prospering at the time he parted with his stock and paying substantial dividends. In addition to these circumstances the corporation made a commission on the sale of the bonds, and certainly was the gainer on the entire transaction.

printer and the company of the contract of the

Troduct of it is the single of the company of Affile bedoing I benieby de l'or brogre d'omprany. Elle hand a la la la collection de promperents de reconsta Engles him about this we grow as he was cashing a come into deah sonding to the Dyrthewn of the corporations. In the live in bundle อดีซี ซอกซื้อกับ เรียกเลวอาการ จักเกมายนกับ เปลี่ หลักของตัวการ แกะ ตรอก ที่อย่นโล 1000 to all addin tylen tapes them and charactery a barefit to believe to to mandadi mnow trial triak ali dates al al glocino gineacotto usias the deplete a contract with the contract of the contract of the contract of on well as the surrengeral of mediciner Me, 1886, were gove of Me beresu vit el ele. enu appliancale que la appliance Model to and the salderstandades the man to the manager · Beologians - of ficial of br. - p - Trees Alah Bod contint of 68% fine of boisting this talkent to come their meaner of abunda tl for the pale of his : only - only and have compacted bounds itshest And the standard of the second of the standard of the second of the seco the proof is proof of the little of the companies of the proof of the companies and the companies are the Maitmen Truet Georgest, the about to do. At received 190 in seel lem egel et ske skoren ougspt 16, in. tikkek it soervet Winds ribility o allocations of a site of the analysis of allocation of the confidence of There, but then the our standing our the cold of the cold state loove defendant in die eritien er levin, reservet ereke out der minimus). This is a claim of the most contained in the interest of e conthless bonds in endouge for strott in the oregion of one here please will the obstance of smis only a continuously mad in the along i amorio secio el saltirio ni cabaebiviò Leitantedes y to the state a constitution on the male of the beart, and

and to usery outline of the year

The master to whom this cause was thrice referred apparently gave the evidence and the questions involved careful consideration. This appears from all of his reports, and we do not see,
under the facts and equities of the case, how he could have fairly
reached any other conclusions. There was no merit to the original
defense, and those interposed by the amended answer were highly
technical and appear to have been afterthoughts. The chancellor
was therefore not justified in sustaining defendant's exceptions
to the master's reports and in dismissing the bill for want of
equity. The decree of the superior court is reversed and the
cause is remanded with directions that a decree be entered in
accordance with the findings and recommendations of the master.

REVERSID AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

The art took in the contract of the course of the contract of

williams 2, 7 s, oud countries, , , , demonits

38903

LOUIS G. QUICKEY, administrator of the estate of Harley D. Warner, deceased,

appellant,

V.

FRANK N. MUMRILL et al., Defendants.

THE MORTHLAN TRUST COMPANY, a corporation, Appellee.

46

APPEAL FROM SUPERIOR COUNTY.

289 I.A. 620

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This appeal is now before this court on rehearing granted.

Plaintiff filed a complaint consisting of five counts against cert in individuals who has executed a trust indenture designating the southern Trust Company as trustee. The trustee executed a note for 30,000, guaranteed by one of the individuals, and it is alleged in these counts that the parties to the trust indenture, other than the Northern Trust Company, were copartners and liable on the guarantee as such, but those counts and those questions are not now before us.

The complaint was ultimately supplemented by an additional count, VI, under which plaintiff joined the forthern Frust learning as defendent and souths to hold it individually liable on the note. A notion to dismiss the additional count on the ground of legal insufficiency was allowed by the court, and this appeal followed. The sole question thus presented for determination is whether count VI sufficiently set forth a cause of ction against the Northern Trust Company in its individual capacity.

Source C. Calabride & Source C. Calabride Co. Calabride C. Calabride C

o gray list of the

e van de dans

ere. .. In the term of the second

's and this will be a large of the above the same the same that the same than the same

This speed is and because the order of the speed of the s

. Million in a standar

THE DOCUMENT

emire willer a live of a speak of the land foreign in its sections of the section of the section

The end of the construction of the approximation of the construction of the constructi

Briefly stated, it is alleged in count VI that plaintiff is the duly appointed, qualified and acting administrator of the estate of Marley D. arner, deceased; that January 12, 1929, the Morthern Trust Company executed and delivered its certain promissory note in the principal sum of 30,000, payable to bearer one year after date, and signed as follows: "The Northern Trust Co., a corporation of Illinois, as Trustee under Trust Deed dated March 4, 1927, known as Trust No. 6761, By A. B. Caswell, Vice Pres." The note bore on its face, beneath the signature, the following notations: (1) "Principal Note No. One. This is to certify that this is the Principal Note described in a Trust weed to Dhicago Title & Trust Company, Trustee, dated Jan. 12th, 1929. Register No. M 39604. CHIC. NO TITLE & THULT COMPANY, Trustee. By W. C. Taggart, Assistant Treasurer, " and (2) "The Morthern Trust Company executes this instrument as trustee, as aforesaid, and it is not to be held liable in its individual capacity in any way by reason of this instrument."

plaintiff's intestate became the owner of said note, for value, and was the owner thereof at the time of his death, and that it became a part of his estate and passed into the hands of plaintiff as administrator; that the words "as Trustee under Trust Deed dated March 4, 1927, known as Trust No. 6761," appearing on said note, are merely words of description and constitute no part of the signature to said note; that the words "The Northern Trust Company executes this instrument as trustee, as aforesaid, and is not to be held liable in its individual capacity in any way by reason of this instrument," appearing after the signature on said note, are insufficient to relieve defendant from individual liability, and that there was no agreement made by plaintiff's intestate to accept said

This is the state of the second of the secon প্রতি হিল্পে কোনো হালেকেই প্রতি প্রতি সালে হাল বিভাগি হোৱা নাম কুম্প্রিক কিন্তু স্থান্ত ভালি হা The second secon was now of the end to manifold the fermion to the about the end of ome server of the first first to be seen the best paid the same gaba there's and other . As the school told in the body early median many instant for district on light redustry our controlled. To make accorded a con-Mangh 4, Mante Surviva and the Challe Tyre and the aller Tion the state of the second of the state of the state of the second of the s of all the gap, sof do. Emphasizer (f) concluder, alsoliel And if given the harder produced grounding the second to shall write late of LINE LEE SALES Tyres its Very arths and bone a free aures of the first of the contract to be an in the contract of the second of the contract of the tyr al yllenge femelele wilki de vad likeland og dør af di han nationers of this to a case he was

It is in the bird of the color of the color of the angle of the angle

words as a part of said agreement, nor any agreement or other contract of plaintiff's intestate to release the Northern Trust Company from its individual liability on said note.

To this count of the complaint defendant filed its written motion to dismiss, and as ground therefor specified the following:

- (1) "It appears from an inspection of the note attached to plaintiff's complaint, and which by ref rence is made a part of said count VI, that this defendant executed said note in its capacity a trustee under fourt greatest dear V reh 4, 19.7, and known as Trust No. 6761, and that this defendant did not execute said note in its individual corporate especity and is not individually liable on said note."
- (2) "It clearly and definitely appears from an inspection of said note and the trust deed accounts the complaint iff a complaint, that this defendant was executing both said note and said trust deed as trustee, and that said note clearly shows that this defendant stipulated therein that it should not be individually liable to the plaintiff, or to the holder of said note, in its individual capacity."

Plaintiff takes the position that the words "As Trustee under said trust agreement, dated March 4. 1927, known as Trust No. 6761," are merely words of description and constitute no part of the signature, and that the bank cannot release itself from individual liability by affixing the stamp hereinbefore set forth. It is argued that a trustee is personally bound by his contracts, unless he exacts an agreement from the other party to look solely to the trust estate. Sec. 20, par. 40, chap. 98, Illinois State Bar Itats., 1935, of the Regotiable Instrument Law, and various authorities are cited to support these contentions.

"Sec. 20. here the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as agent, or as filling a representative character without disclosing his principal, does not exempt him from from personal liability."

The effect and construction of this section of the statute has carefully sensidered and discussed in fampa investment and recurities Co.

v. Taylor, 272 lll. upp. 541. In that case plaintin sund to recover on two promissory notes signed "Orville Taylor, N. h. Demeter, as

the contract of the contract o

10 this some of the contract of the contract of the first figuration to the contract of the co

State to the control of the control of the state of the control of

A liter out to most our construction that give the given out the ration biss to significant the property of th

. Anday is the army of the Step Step on the army of the standard

under soid tract agreement, discontinuous, allerights and communication and communication of the communication and communication and communication and communication and communications and communications

""" on a market of the contract of the contrac

trustees." In the course of the trial Taylor, who had appealed, offered to prove that pursuant to an oral agreement with one of the indorsers the notes had been executed in behalf of certain individuals and that he was not to become personally liable thereon. The court refused the tender of parol evidence, but upon appeal the cause was reversed and remanded with directions that defendant be permitted to introduce evidence in support of his defense. In an exhaustive opinion liled in that come the court reviewed the historical reasons leading up to the enestment of see. 20 of the Regotiable Instrument Law, and pointed out that the 1 mguage of that section was largely determined by what the bar generally believed to be the unjust result reached in the case of loger illians National Bank v. Groton Mrg. Co., 16 R. I. 504, where the trustees of an estate, acting in conformity with the directions of the testator, were held personally liable on a promissory note they had indeced as trustees. Draman's Megotiable Instruments Law, 4th ed., p. 164, was cited to the that the commissioners and draftsmen of the Mogotiable Instrument Law intended by the enactment of sec. 20 "to clear up the unnecessary and unpardonable confusion caused by the failure of some of the courts to exercise a little common sense and to recomine more intile usage," and the court concluded that section 20 "changed the previous rule that a name followed by a designation as to some relationship to another, could be considered only descriptio personae, and the maker thereof personally liable." Jumerous cases in various juris ictions are cited and discussed in this decision. As to concre v. Pices, 79 Ill. 493, and Trustees of Echools v. Rautenberg, 38 Al. 310, relied on by plaintiff, it was point dout that these cases agre decided long before sec. 20 was enseted; that olf v. chill Trust a savings Bank, 276 Ill. App. 527, involved no discussion of the question under consideration, and that Taylor v. Lavis, 110 U. . 330, did not involve a

of the second of the contract of the contract of the theoretages with the last many or ground for them. In exposit to the bounds of the menten and the important and the menten before the important and note: The control of despolations included the the city of 20%, a site of a line of the with the distance will be a substitution of the state of the state of the substitution tended by the dunctions of the 20 "se along or the unnecessary and e communication of the action of the following and appropriate and the continuous of smother, could be agained and decomposite a comment, and the article Configure the second of a consequence of the second of the second Soils with a first to have a verteen to group to be not the first THE I A REAL TREATMENT OF AMERICAN SERVICES BUT TO SERVICE STATE OF THE SERVICES AND ASSESSMENT OF THE SERVICES ASSESSMENT OF THE SERVICES ASSESSMENT OF THE SERVICES AND ASSESSMENT OF TH galaci galiwas - dandi bakir sar bey daic a edamae da CS cos sinasi along a law law and a real to the analysis of the second of the law and a real and a rea

e over your send that you we will be so out to a subject to the continue

negotiable instrument and was decided long before the enactment of sec. 20. From the various decisions cited in Tampa Investment and Securities Co. v. Taylor, supra, the court concluded that while the decisions interpreting the statutes in various states are not entirely in harmony, the rule usually followed is apparently to the effect that where the trustee has authority, as between the parties or those taking the instruments without notice, it may be shown by parol that the principal for whom the trustee was assuming to act was known, and that where the note discloses the name of the principal the signers are not individually liable; that so far as immocent purchasers for value are concerned, however, the representative character of the party must be disclosed on the face of the note.

Under the Tampa case and the authorities cited therein, defendant should be given an opportunity to show by parol evidence, if it can, that the principal for whom it was assuming to act as trustee was known or could have been ascertained by inquiry, and that it is not individually liable on the note. Since the matter was presented to the trial court on a question of pleading, however, it was error to sustain the motion to dismiss the complaint.

bound by his contracts unless he kacts an agreement from the other party to look solely to the trust estate. O'Connell v. Horwich,

284 Ill. App. 554, a recent decision of this court, and other cases are cited to support this contention. In this connection it is argued that the trustee becomes personally liable unless he stipulates in so many words that the holder of the note is to look solely to the trust estate for payment, and that an inspection of the note in question fails to show any agreement between the parties that the payee is to look solely to the trust estate. It is undoubtedly a

tonde state the control of a state of the control of the state of the state of the state of the control of the

Under the Paper oran car of percentage of the carbonists of the poster are reliable of the carbonial section of percentage and the carbonial state the carbonial sections in the carbonial sections to be a considered and the carbonial sections of the carbonial sections are considered by the past of the sections of the carbonial sections are considered to the section of the carbonial section of the carbonial section of the carbonial section of the carbonial sections are carbonial to the carbonial section of the carbonial sections.

It is unged also by Johns Town constant in a present in a present in an illigated by his constant that the translation of the constant in a translation of the constant in the constant of the

rule of trusts, announced in many decisions, that where a trustee enters into a contract he is personally bound unless he exacts an agreement that he is not to be personally liable and that the other party is to look solely to the trust estate, but it would be absurd to apply that rule to the facts of this case, in view of the plain stipulation on the face of the note that the Northern Trust Company is not to be personally liable and other notations plainly indicating that it signed the instrument as trustee, giving sufficient information on the face of the note to offord the holder full opportunity of ascertaining the particulars of the trust agreement and the beneficiaries of the trust. Moreover, we think that in the signature of the note by the trustee, together with the notations that follow indicating that the Worthern Trust Company is not to be held personally liable, there is necessarily implied the stipulation that plaintiff's intertate, who became the holder of the note, had to look to the trust estate, and it was not necessary to make the specific recital in so many words that the party dealing with the trustee was to look solely to the trust property. In order to apply the rule contended for by plaintiff, we would be obliged to disregard sec. 20 of the Megotiable Instrument Law, our own decision in the Tampa case, supre, and other authorities cited in defendant's brief holding otherwise.

Lastly, it is urged by plaintiff that the rubber stamp indorsement appearing after defendant's simpture on the note, purporting to release it from individual liability, is a nullity. Current authority does not sustain this contention. It was said in conomy Puse Co. v. Standard Electric Co., 359 Ill. 504;

"Notations or memoranda placed on the back of a check contemporaneously with the execution of the instrument, with intention of making them a part of the contract for payment of money, constitute as much a part of the instrument as though incorporated in the body thereof. In the absence of vidence concerning the intention of the maker in placing such notation on the back of a

TENTRE TENTRE OF THE PROPERTY OF THE PROPERTY

-in the first for the sold for the sold in the sold in the sold of the sold of

Listing wing the first or the supposed that is the side thing the start of the start of the start of the side of the start of the start

en end verse e ser o i de la collège de la c

ingregye, et få er elle mediterine ett i udekken den søndenjidnesidn

The second secon

to the time that the telephone is a second to the standard of the second to the second

The first of the f

check it will be presumed to have been mace contemporaneously with the instrument and as a part of it and will be iven effect as if made in the body thereof."

In scholbe v. chuchardt, 292 Ill. 529, the following marginal memorandum appeared on the face of the note: "This note is given to secure 5,000 shares of Regina stock." In an action on the note the proof indicated that the words were affixed at the time the instrument was executed and delivered, and it was held that (pp. 534-35):

"Those words must be considered the same as if they had been written over the signature of hax schuchardt and as a part of the instrument itself. The weight of the authorities is undoubtedly to the effect that such words are as binding on the parties to the instrument as if they were incorporated in the body of it before it was signed, and that is also the holding of this court."

To the same effect was Van Landt v. Mookins, 151 Ill. 248, where a similar principle was announced.

For the reasons stated the order of the superior court dismissing count VI of the complaint for insufficiency is reversed and the cause is remended with directions that defendant be required to plead to this count of the complaint, and that further proceedsings be had not inconsistent with the views expressed herein.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur-

The second of th

AN ACTION OF A CONTRACT OF A C

The contract of the contract o

a . Tanto (en la suato della propriedita del prime menti una dipolita secon sella ciù

THE STATE OF THE SELF IN THE SELF IN THE SELF IN A CHESTIC CHESTICS OF THE SELFCENT OF THE SEL

CHILITANDO CO TO CONCINCIO CONCINCIO CONCINCIO

38951

CHARLES DeLEUW & COMPANY, a corporation,

Appellee,

VILLAGE OF MIDLOTHIAN, a municipal corporation, Appellant. APPEAL FROM CIRCUIT COURT, COOK COUNCY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for engineering services rendered the Village of Midlothian under a mitten contract of employment. The cause was tried without a jury, to ulting in findings and judgment for plaintiff of of,671.25, from which defendant appeals.

Briefly stated, the complaint alleges that October 18, 1927, defendant. a municipal corporation, entered into a written contract with L. F. Kelker, Jr., and Charles DeLeuw, copartners, plaintiff's predecations, under which the latter agreed to reme rail an incering services in connection with the installation of an improved water system and for a combination senitary and storm ester sewer within the Village of Mislothian. A copy of the contract, which outlines the services to be rendered by plaintiff and stipulates the compensation to be received, is incorporated in the complaint.

with reference to the improved water system it is alleged that, by direction of the board of local improvements of the village, plaintiff prepared necessary plans, estimates no am originating resolution covering the proposed imprevement and presented it to the ocard, he adopted the plan; that a pullic hearing was held March 20, 1928, pursuant to the resolution, and thereafter the

ANTARAN TERRAT (\* 0008-105) s oorgan blos,

¿i.Viid:0.5.lld to t0..jllV

¿nold-reques Logicinum .;
;imilang.

. KIRTO AND OR LOTHER OF WARRING WILLS AND LONDON CONTROL . LET

Light in the best of the color of the colors of the colors in the colors of the colors

Deficilly administrative of the englishing characters are archer 13, 1827, softened and a statement of the contract of the con

to the local and the control of the second o

board approved a draft of the ordinance for the proposed improvement and recommended wassage thereof to the trustees of the village, who passed the ordinance, and March 27, 1928, caused a petition to be filed in the County court of Cook county for the levy of a special assessment to pay the cost of the improvement, which according to estimates prepared by plaintiff amounted to 172,485; that proce dings were had in the county court pursuant to passage of the ordinance, and June 11, 1923, the board directed claintiff to prepare an advertisement for bids, returnable July 3, 1928; that plaintiff did all the work required under its contract and became entitled to be paid for services in accordance therewith. It is alleged that June 29, 1928, the village caused all orders to be vacated, and thereafter directed plaintiff to prepare new plans, estimates and a resolution for similar improvements, differing only in certain particulars; that plaintiff rendered the necessary services under the new plan, which was adopted July 6, 1928; that after public hearings had July 17 and August 7, 1928, the board passed a resolution adhering to the plan, and recommended passage of an ordinance by the trustees, who passed the required ordinance, and Leptember 10, 1928, caused a new petition to be filed in the county court for the levy of a special assessment to pay for the cost of the improvement; that an order of default and confirmation of the entire assessment roll was thereafter, October 18, 1928, entered in the county court, except as to certain property owners who objected thereto, and February 21, 1930, defendant caused the second petition to be dismissed, by reason whereof plaintiff became entitled to additional compensation under its contract.

With reference to the proposed construction of a dystem of combined sanitary and storm water sewers for a portion of the village, the complaint alleges that plaintiff was directed to make complete surveys, borings, plans, estimates and to prepare an eriginating

et i til et e ga e e cent i die en tie di tie digender build de gas imm dans and present the environment, see the environment, and the environment of Interest of the file of the state of the state of the state of the state of CARSSEMENT to represent the first court of the topology of the reservoir Continue and the first production of the continue of the conti were had in the county court of the court county of the conend June 11, 1923, the same francis is it in it to be one one ticement for bids, sequentible and leading the beautiful and obtaining the The mercan self-harm record is devoluted the but better after all . Formall on a second of the first the construction of the profession of 1928, the villings commend the collins to sections of the collins of the switchEntropy of the old of the contents, when the object of this mixing before to waste remaining on an early often matter than a the contract where the collyges proposed as herobert This mister was edopted July G. 2000; the ment within its into he July it end 'agaet 7, 1913, the beard or beard of the that who ming on the plan, and recommended paperage of an explanated by the truckes, in which have a facility of the court is not provided the sound of the court is petition to be filed in the country sound for the hear of each the To write me a site progress of the 20 hors off took wag of them horses defeult end confirmation of the entire and even it tell in about the the wast of the edge. . Greate Withhole out the position, GREE 'st wet AND THE REAL PROPERTY OF THE SECTION reared the second potitions to be direct access by the court of the condition of the same of the s

A LEE FEE CONTRACTOR OF A CONT

resolution; that these services were rendered and acted upon by the board of local improvements and the village trustees, and carried through to the filing of the petition in the lounty court of Cook county, where proper dings were had resulting in the default and confirmation as to all assessments except certain parcels of property for which objections had been filed; that march 8, 1925, defendant allowed the petition in the county court to be dismissed by reason whereof plaintiff became entitled to be paid for its services.

It is alleged further that July 2, 1928, the village dispensed with the services of plaintiff as engineers of the village and employed other engineers; that when bills for services rendered were presented to the village defendent refused to recognize any of plaintiff claims, and finally, October 1, 1931, defendant notified plaintiff that the contract was terminated, in accordance with the terms thereof, but refused to pay plaintiff for any of the services therefore rendered.

Upon hearing of the cause it was stipulated that the facts set .o.th in the complaint were true, with the exception that defendant reserved the right to show that (1) the work for which plaintiff claimed compensation was not performed in good filth; (2) that the value of the services performed was not admitted; and (5) that it was not agreed that the assessment proceedings were dismissed by defendant, as alleged.

a prior appropriation to meet the expenses thereof, in ecordince with part 1, sec. 4, art. 7 of the Cities and Villages act, and no appropriation having been made, the centract is void and there can be no recovery thereon. The statute relied on (Illinois state Bar Stats. 1935, chap. 24, part 1, sec. 4, par. 95, p. 306) provides as

The board of the field of the control of the contro

It is chicago included to be subjected by this plane, the validation of including the appropriate of the continues of the con

Upon hereing of the serve is a statement of the statement in the statement of the serve and upon the serve of the serve of

is is arged by derivable that the entry through the activities prior as a circles prior as as prior as a prior as an area of the activity of the entry the entry is an area of the continue of the entry through the first and area of the entry through the first and area of the entry through the first area of the entry through the entry t

follows:

"No contract shall be hereafter made by the City council or board of trustees, or any committee or member there is end no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the appropriation has been previously more conserving such expense, except as herein otherwise expressly provided. \* \* \*\*\*

Dekan v. City of Streater, 316 III. 123, is cited by descendent as constraing the statute in accordance with plaintiff's contention. In that case the city entered into a contract with an engineer to design a certain sewer system. No appropriation had been made for the compensation to be paid the engineer under the terms of his contract. The services were rendered as contemplated and the city desired to pay him, but a taxpayer intervened and procured a decree restraining the city from paying any sum for the services of the engineer. Upon appeal the decree was sustained, the supreme court helding that inasmuch as no appropriation had been made in accordance with sec. 4 of art. 7 of the Cities and villages act, the contract was one expressly prohibited by statute and therefore void.

Defendant concedes, however, that the foregoing statute and the authority cited is applicable only to contracts payable out of the general corporate runds, and it therefore becomes importent to determine whether the moneys due for the services rendered by plaintiff under the centract in question were payable out of the general corporate funds, or solely out of a fund to be raised by special assessment. The contract is quite lengthy, and a consideration of its various provisions requires that it be set out in full, as follows:

### "CONTRACT

## FOR ENGINEERING SERVICES

Articles of greement between the Village of Michothian, a municipal corporation of the annty of Cook and state of Illineis,

#### i modifici

The area of the state of the st

the state of the s

The first operations are seen so not not the result of filters and a constant and a constant and a first filter filter of the space of the analysis of a section and a constant of the real process of the analysis of a constant of the real process of the analysis of the real process of t

.

The side curious of them is a substitute of the curious of the cur

And D. Belli to the 122 Intellers of all dramates and two deltas.
 Intellection of the shoot in the set of the religious and the religious and the set of the set

acting by and through its President and the Board of Trustees (hereinafter designated the 'Village' which term shall include any officer or Board of said municipal corporation having power to represent it, or act for it, in relation to any part of the subject matter of this contract) and Kelker, DeLeuw & Company, a partnership of Chicago, Illinois (hereinafter designated the 'Engineers') WITNESSETH:

In consideration of the agreements hereinafter set forth, it is mutually agreed as follows:

### ARTICLE I.

## EMPLOYMENT OF INCINEERS

That the Village hereby employs the Ingineers to render the services hereinafter set forth and all other engineering services necessary to the proper completion of all improvements to be undertaken by the Village, which services the ingineers shall perform.

#### ARTICLE II.

## SURVEYS AND PLANS.

The Ingineers shall make an investigation and survey of all districts covered by proposed improvements which shall include the running of all levels and making all subsoil investigations that may be necessary to enable them to establish satisfactory lines and grades, to which said works shall be constructed. They will advise with the Village in regard to the extent of the improvements, the type of materials and appurtenances to be used in connection therewith.

#### ARTICLE III.

#### SERVICES.

When so directed by the Village the Angineers shall make detailed estimates of cost, attend hearings, and after said hearings, will revise the estimates as may be directed by the Village, for each improvement. The angineers shall make recommendations, which shall be based upon the survey and estimates hereinabove mentioned. After passage of the ordinance the Engineers shall assist the attorney for the Village in all matters requiring engineering services in the preparation for and prosecution of any and all condemnations and/or proceedings to secure confirmation of special assessments or special taxes in court.

The Engineers shall make all necessary plans of the work to be done. They shall make such detailed plans on a large scale as may be necessary or desirable for the President and Board of Trustees. The Engineers shall prepare specifications outlining the work to be done, and submit same to the Village for approval. The Engineers shall also prepare proposal blanks and forms for advertisement, and shall be present and advise with the Village at the time of letting the contracts.

## ARTICLE IV.

## SUPERVISION.

The Engineers shall supervise the construction of said

oblast for the firmant like and interest interest of the second of the s

in a companie de la c

### But have been

#### Cathalland Land Market Contract

This is the selection of the property of the selection of

## MAND MER WIND

To work in the left of the water education of the order of the confidence of the con

continued and the state of the

The on insure blood and and the selection of the selection of the one of the one to be designed to be designed to be an appearance of the selection of the outless of the contract of the contract of the selection of the contract of the contract of the contract.

#### . VE TENTY

#### ALTERIATION CO.

improvements to see that all clauses of the specifications are complied with and that satisfactory progress is made. For that purpose they shall employ and pay a competent Resident Ingineer together with such assistants and inspectors as may be necessary who shall be on the work from beginning to completion.

### ARTICLE V.

#### PREPARATION OF ESTIMATES.

The ingineers shall prepare estimates of work actually constructed and in its permanent place, and on or before the first Monday of each month shall make a report to the Village showing the amount of work done during the previous month and the total amount done to date. The Engineers shall, in general, discharge all administrative duties connected with the engineering work.

#### ARTICLE VI.

## DUTIES OF VILLAGE.

The Village agrees to co-operate with the Engineers in the prosecution of this contract and to further the completion of the contract by every possible means.

### ARTICLE VII.

### FEES AND PAYMENTS.

The Village shall pay to the Engineers as compensation for their services hereunder from time to time as said services are being performed, the following amounts:

- 1. On the first \$100,000 or fraction thereof of the cost of each improvement a fee equal to five per cent (5%) of the octual cost of the improvement;
- 2. On all amounts over 1100,000 and less than \$200,000 of the cost of each improvement a fee equal to four and one-half percent (4 1/2%) of that portion of the actual cost of the improvement; and
- 3. On all amounts over 1200,000 of the cost of each improvement a fee equal to four percent (4°) of the portion of the courl cost of the improvement, payable as follows:
- (a) Upon the letting of any contract a sum equal to fifty percent (50%) of the fee;
- (b) During the progress of the work, as and when payments are made to the contractor, a sum equal to fifty percent (50) of the fee proportioned on the amount due and payable for work done, until the full fee has been paid, it being understood that the Engineer shall in no event receive in the aggregate more than the above named percentages on the actual cost of any improvement as compensation for all services performed hereunder in connection with such improvement;
- (c) In the event that any improvement is postponed, it is hereby stipulated that such postponement shall in no way affect this contract, and no portion of the fee herein stipulated to be paid, shall be due and payable until the letting of the contract, as hereinabove set forth.
  - (d) Payment to be made in cash, or in special assessment

. T. J. 10.15

## A THOMAS AND THE SERVICE

Affication for in interest a common a likely and like one of a some of the source of the common of the source of the common of t

## . ALLE O. VILLAGE.

.

The Village syrum of a security with the compount of the contract of the present in the contract of the contra

## . The thirty of the state of

The maid-consecute an orderly by the calculation of the equilibrium of the consecution of

- i es de che le comi rele al estate de le de la comi de la comita del comita de la comita del comita de la comita del comita de la comit
- 8: In all so operators of the control of the contro
- - (a) Upon the Labelin of anterest contract concrete to alking formation (b) ) of the first
  - (a) marin place of the control of th
    - na il permore on di interverse di parte dell'anterverse di parte dell'anterverse di parte di parte di parte di parte di parte di sulla di

or special tax vouchers bearing interest at the late of six percent (6%) per annum; provided that payment shall not he made in such vouchers, and acceptance of them by the Engineers shall not constitute payment, unless and until a valid special assessment or special tax is levied for the payment thereof and a contract is duly let and work started on the construction of said improvements.

#### ARTICLE VIII.

#### TERMINATION OF CONTRACT.

This contract may be terminated by either party hereto by giving a fifteen (15) day notice in writing to the other party of its intention to cancel said contract. In the event of cancellation under this Article, payment to the Engineers for services rendered shall be made on a provide basis, and in case agreement as to claims for services rendered cannot be reached by the parties hereto, then within ten (10) days each party shall name a representative and said representative shall select a third member of an arbitration boars, and the decision of said board recarding any claim or claims shall be final and binding upon both parties.

\* \* \*

Executed in duplicate on this 18th day of October, 1927.

Village of Midlothian, By J. W. Hamilton, President of the Board of Trustees.

Attest:

William R. Schallerer, Village Clerk.

(Corporate Seal)

Kelker, DeLeuw & Company By: R. F. Kelker, Jr."

fies the services necessary to the proper completion of all improvements to be undertaken by the village. Article III refers to detailed estimates of cost, attending hearings, making recommandations, assisting the village atterney in matters requiring engineering services, in preparation for and producution of condemnation, special assessment and special tax cases in court. Article VII, providing for payment of these services, contemplates that "payment shall be made in each or in special assessment or special tax vouchers," and not until contracts are let. Under the procedure followed in levying assessments, the awarding of contracts follows the con-

and the second of the second o

# 

This control of the factor of the fire in the fire to the fire of the fire of

... i , serve in the could be a subtique of between

Villatory, out little this control Villatory. Ognåre i bredin borg

: doedd:

sillian A. ohallaror,

Light of Milds

Loller, Delous & Committee

If well is the service of the control of the contro

firmation of the assessment, and the collection of the assessment follows the letting of the contract and the issuing of the first voucher to the contractor. It usually follows that when an assessment is put into collection a portion of the first installment is promptly onid, which gives the village sufficient cash to pay a considerable amount on account of expenses of the improvement. Par. (d) of article VII of the contract provides that cash may be used from the assessment collections to pay the engineer on account, and that special assessment vouchers may be used, and it specifies that the delivery of vouchers and acceptance thereof by the entineers shall not constitute payment unless and until the tex is levied, the contract is let and the work is started on the construction. This provision indicates that the voushers were to be regreed as payment if the tax was levied, the contract let and the work started, and thereafter the village would no longer have the right to vacate the assessment, abandon the improvement and dismiss the proceeding. From these various provisions of the contract, it seems reasonably clear plaintiff was to be paid for its services from special assessment funds. Moreover, it appears from the proper that the Village of Midlothian had but recently been organized and its assessed valuation was rather small. The improvements contemplated by the contract were estimated at some \$800,000. The debt incurring power of the village was not sufficient to pay for the improvements by general taxation. The only conclusion to be drawn from these circumstances is that the improvements, including plaintiff's services, were to be derived by special assemment. This was the construction placed upon the contract by the trial court, and we think it was correct.

Plaintiff's counsel cite Gage v. Village of silmette, 230 Ill. 428, wherein engineers, not regularly employed by the city, were retained to do special work on certain improvements. In discussing the

The first and the second control of the seco

delign by of ventiliar and the control of the formation of the first control of which the global in the second filter who mades for appropriation and for with the dalphoint to the part of the court of the trop will be the date of the set of the court. that was lawied, our statement is the size offer that and, in some probability ∢ಶವಾನಿಗಳು ಅವರು ಕಾರಿ ಕರ್ನಿಕರ್ಕರು ಹೆಸ್ತಾನೆಯ ಅಂದ ಆಗ್ರೆ ಸರ್ಕಾರ ಕೆ ಅಥ ಸತಿಗಳು ರಾಗ್ಯಕ್ಕೆಕೆಯ ಅವರೆ i en microsof o of the special to select the contract of he is a property of the special contract of De griff d'or éture de la company de la la la la la la la company de la la la company de la company with but the first method of the complete with the test of the made of the complete of the com oute allieur suit et en prit uit e en besteur, wit buy bestimple meed ingrooverments and applicable for the case brook to the characters and sayining on the against off to area, quinter at this call the fundament of the left of the life week limited by the Misselle very mile and well was es -under 1 (times a negations that is the simple one is another one in the second of the the plaintiff of the conviction of the two the states of the contract of the c farmer for a min the government will a far pass to a promain the was as a sign siorates day al Maint on bus

Finistiff a council distribute vertical vertical of Alastiff and the color of the c

compensation claimed by the special engineers, the court seid (p. 435):

"For example, if a village does not have a regular engineer employed at a stated salary, such a man might be hired and paid for his special work on the improvement out of the funds raised by that assessment."

It is next urged that even assuming the contract was payable solely out of special assessment funds, still plaintiff cannot recover for the reasonable value of the engineering services rendered, because (1) the services performed were not rendered in good faith; (2) the originating special assessment ordinances relative to the two improvements were invalid and void, and therefore plaintiff acquired no rights by virtue of said ordinances; and (3) the fact that the special assessments in question were not levied was not the fault of the village. As to the first point, it is argued that when the engineering services were rendered the village had no water supply of its own, nor did it have any contract with any person or corporation by which the water could be supplied for use in any water mains to be constructed, and defendant's counsel say that, notwiths tanding all these facts were known to plainting, it nevertheless proceeded to perform engineering services and accumulated charges against the village, when it was by no means certain that any benefit would accrue to the village through the services per-"e think it a sufficient caseer to this contention to point out that the village of Midlothian was located in the conitary district, adjoining the Village of sosen, and that chicago water from Lake Michigan had been brought to the boundary line of the village. Under sec. 26, par. 366, p. 1388, chap. 42, Illinois (tate Bar Stats., 1935, the Village of Midlothian, upon proper choving, had the right to enter and by mandamus could compal delivery thereof into its mains. (City of Chicago v. Town of Cicaro, 210 Jil. 230.) Under the circumstances plain inf's good faith cannot be seriously

thur livers of a first like a side of emainic and adminimos

(88% ag)

overfor toda, a a evid von sent palita e la pelagram solt zol lan a e e da no a a a a dan entre pale bedrata e las repaleur pale tol a lan dant calc lo uno toda evigas cros no mo talabago did ".tmanusergo

#Dirty of the state of ental acres of the enterior and a refer to will be a considered and accompanies of the Arman and a considered and a c esystem for the reconstant a factor of continentalist of twice and rever ried, a like like both bound on a control of the like a like (I) are not because of -c. Lillertin broken de det . Le ris bifried ou i timbury commit out Second with a figure darking of or on the anility reit to dimentioner german the fill describe the expension of all other contents to the the tasks. grand to the should be also in the same of the same and and the same and and the same and the sa with the first of the control of the bodeljastoon kan anniver maistersines string of bebooker as follows # THE REPORTED AND ADMINISTRATION OF THE PROPERTY OF THE PROPE with the livery of the claration of this will be described the set with the contract of the co thin to this at a sint of the first of the state of out that the villaged off it I office and Report . It is in the opening wrigh, adjoining the filling out to among and the evilage to the above Lake the bill on the contract of the contract with the contract the contract of Vader sec. 26, par. Udd. : Trad, chef. 4', billindi : t v. 1 m. Restar, 1906, the tilling of the Code on the control of lower by your list from a firm of the partition of the safe and the safe into the all appeals to see any or other to git;

questioned .

with reference to the second point, it is urged by defendant that the special assessment crainance was invalid because no provision had been made for bringing a water supply into the village, and also because the village had no outlet for the proposed sewer Village of Gardner v. Christiansen, 321 Ill. 225, is cited. It is admitted that all legal objections in the special assessment proceeding concerning this water improvement were overruled by the county court on June 9, 1928, and thereafter the village voluntarily caused all orders in the proceedings to be vacated and the petition to be dismissed. Moreover, the Gardner case relied on by defendant was an appeal from a judgment of the county court holding the assessment invalid because the contract introduced in evidence in that case did not assure an elevated tank and a pump to transfer the water from the source of supply to the distribution system, but we do not understand that case as holding that the ordinance there was invalid. The village of Midlothian had express authority by scatute to contract with the Canitary District of Chicago as to sewers under par. 1146, sec. 1, chap. 24, Illinois State Bar Stats., 1935, and it could also, by proper proceedings, have obtained a supply of water for the village.

with reference to the third point, it is commeded by defendant that the special assessment proceeding in the county court was dismissed on motion of defendant, but it says that the village was fully justified in dismissing the proceeding because, under the authority of Village of Gardner v. Christiansen, supra, the proceeding was illegal and improper, on the ground that no water supply was available. As to the dismissal of the second special assessment proceeding, it is argued that the facts are somewhat different, and that the case was not dismissed upon the motion of the defendant, but upon legal objections of certain property owners because the village had no outlet for the sewer system contemplated. This is true that there was no evidence

. Commission

Appropriate contract to the contract of the propriate product of the contract -. For the parameter of the first that the first theorem is also not been the first theorem. e that the combinations in the condition with the condition of their model had no fin Surroused Enternational and the transfer deposit for this books are at the county court on June 19, 2007, and Germelten the while a votant enlay g fried this art is did with ed minit whose out its expense fin beaute to be distinguised. Theretain, the threat a give a sire to a line as well that a lift that move of control who thes to drive to me ocuses son bits viliage of Hislocklan had agree and order by by an but, to anter the this the standard the limit of the same and the same and the same and the ace 1, char. High Hildmain show it it is a like , the carlo at the by proper proceedings, nowe obtained a repole of access the the white p

ther the special assument proceeding in the court of the fact that is not be successful to the fact that is not by the factor of the court of the co

aguatem om temple to de la trace that the company of the company o

entre come to the properties all the entreprise of the entreprise to the

tending to show that an outlet had been provided for the sewage of the village, this omission was due to the failure of the village to make a proper showing that the village was located within the sanitary district, and could have made a contract with the district for disposing of its sewage. It was not the function of plaintiff's predecessors, who were engineers, to supply this proof. The attorneys for the village, who had charge of the proceeding, could easily have supplied the necessary evidence, and their failure or refusal to do so does not justify defendant in now arguing that the petition was dismissed because of the objections made.

Plaintiff argues that it may recover for services rendered even though the proceedings were dismissed, and its counsel cites the case of Gray v. City of Joliet, 287 III. 280, where, after reviewing the authorities, the court concluded as follows:

"Without extending this discussion further, it is our convinction that while a city having a population of less than 100,000 may by ordinance, under the proviso to section 94, provide for the payment of the expense of levving an assessment from the fund produced by levying it, it cannot relieve itself from liability to pay the reasonable expenses incurred where the city itself voluntarity abandons and dismisses the proceeding before judgment of confirmation."

The record shows that July 2, 1929, the president and board of trustees of the village dispensed with plaintiff's services, employed other engineers and refused to recognize any claim on the part of plaintiff for the services rendered, necessitating this suit. It seems reasonably clear that the first proceeding in the county court was voluntarily dismissed by the village, and that the second proceeding was dismissed because the village refused or neglected to make a proper showing to overcome the objection of certain property owners. The village of Midlothian had received and accepted the benefits of plaintiff's services, as engineers, and under the case of Eurrie v.

Marper, 249 Ill. Top. 586, cited by plaintiff, we think it should be required to pay the value of the services in accordance with the

Antile of the collection of th

Then the transfer of the second-material problem we Tailer in.

First frame of the second-material part of the very list through appropriate the contract of the contract of the very transfer of the contract of the contract

convincion the continue of the state of control of colors and control of the control of the color of the colo

terms of the contract. In Anderson v. City of Highland Park, 276 Ill. App. 327, the court said, quoting from Chicago v. Pittsburg, C. G. & St. L. Ry. Co., 244 Ill. 220:

honesty and fair dealing that are a plicable to individuals and private corporations. If a city may lawfully exercise a power, it may be equitably estopped to cuestion the validity of its exercise on account of the manner in which it is done or the lack of required formalities, as right and justice require. \* \* \*! Having accepted the benefits of the work of the plaintiff, it would be inequitable and unjust to permit the defendant to defeat the claim of the plaintiff, by relying on the ordinances.

A like expression is contained in Bunge v. Downers Grove Sanitary
District, 356 lil. 531, where attorneys sought to recover fees for
services rendered in connection with senitary district proceedings.
The sanitary district had there decided to abandon the improvements, supposing the ordinances void. The court, however, held (p.
537):

"It has been repeatedly held by this court that where a special assessment proceeding is not carried to completion, either because of the invalidity of the ordinance or because it is dismissed before confirmation, the nunicipality cannot avoid carried by setting up the contingent nature of the contract but is Jiable out of the general fund. (Mahar v. City of Chicago, 38 III. 2.6: Gray v. City of Joliet, 287 III. 230.)

Lastly, it is urged that the court abused its discretion in refusing to permit defendant to plead the statute of limitations. This amendment was not filed until after the case had seen submitted to the court, the evidence heard, the arguments made and the court had announced its decision. The amendment was apparently an afterthought, and was interposed as a speculative measure in the defense of its case. When it appeared that the court had found the issues in favor of plaintiff, the statute of limitations was interposed and urged as a defense. To think the court was entirely within its discretion in refusing to permit the amendment of that stage of the proceeding. Moreover, the contract between defendent and plaintiff's predecessors was not finally terminated until Setober 1, 1991, and this proceeding was instituted earch 15, 1995, which

Office of the control of the control

The first the second se

The property of the control of the c

An Appropriate Section of the sectio

Holdf tabliff (C. Motte correctional accordance of the correspondence of

was within the five year period.

We find no convincing reason for reversal and therefore the judgment of the circuit court is affirmed.

AND IPMID.

Sullivan, P. J., and Scanlan, J., concur.

About the many than the state of the state of the

en en 1, p. Not de C. vie des proposes pripalitatio **on** bais par

S. Carrier

A William to a continue for a contribution

38977

JULIUS LUHRSEN, administrator of the estate of ALFRED L. MULLER, deceased,

Appellee,

V.

JOHN MARCUS and FRANK W. GLEN, Appellants. 48

APPEAL FROM SUFERIOR COURT, COOK COUNTY.

209 I.A. 620

MR. JUSTICE FRIEND DELIVERED THE OFFICEN OF THE COURT.

Julius Luhrsen, administrator of the estate of Alfred L. Muller, deceased, brought an action of trespass on the case against defendants for damages resulting in the wrongful death of his intestate through a collision between an automobile owned and driven by the administrator, in which his intestate was riding as a passenger, and a truck and trailer owned by Frank W. Glen and driven by John Marcus. Trial was had by jury, resulting in a verdict and judgment for \$7,500. The cause is here for the second time on appeal, the first opinion having been filed, but not published in full, December 31, 1934 (Luhrsen, adm'r v. Marcus and Glen, 278 Ill. App. 628, opinion No. 37485).

The essential facts disclose that Glen was engaged in hauling freight between Chicago and various points. December 17, 1931, Marcus, a licensed chauffeur employed by Glen, left at Louis with a truck and trailer some thirty-one feet in length, loaded with 6,000 or 7,000 pounds of freight. He spent the night at Mattoon, Illinois, and the following morning the generator on the truck burned out. It being Sunday, Marcus was unable to have it repaired, but he purchased a new battery en route and continued

THE THE LITTLE SECTION AND CONTROL OF A PROPERTY OF A PROPERTY AND A PROPERTY AND

JUNE AT MURRI THE CUCCULARIES OF THE COMMENTS OF THE COMMENTS

THE THE DESCRIPTION OF THE SECOND STREET

Judies Palentes, oderand of the estimate of Films.

J. Indies, december, brought an estima of tweemen on the ornerinst defendant, for demigns resulting in the enemial device of his intentation the amount a solidation between on and anabile of me end driven by the administration, in his his his driven by the administration, in his his his driven by Telm Merons. Tried was had by judy, deviation of the end for "Thied was had by judy, deviation of the end for the end of the time of fuderal the "Thied was had by judy, deviation of the end of the time of appeals the time of appeals the time of the time of appeals the time of a time of the time of the time of a time of the tim

The ersoniisi fraction this or the think that the continue of the hauling freight between this or the various , which, a continue My, 1951, Marcus, a liversed shouldeur employed by blany last at. Louis with a truck and trailer some this by-and foot in langth, louis fultion of 7,000 pounts of the factor, to spent the minks of the fathorn, Illinois, and the fallowing mornin the generator and the truck burned out. It being among the markey, there a marked to be the pure the truck burned out. It being among the order of the continue of the

toward Chicago. About 11 o'clock in the forencon he picked up a young men, named Martin Madai. Marcus drove the truck northward at the rate of about 30 miles an hour untily/as he testified, he reached Monee, Illinois, around 4:40 in the efternoen. There he turned on the rear lights on the trailer, but because it was still twilight he did not turn on the headlights. He contimued on his journey, and was proceeding north on route 49 when the engine began to sputter, due to a shortage of gasoline. He thereupon pulled the truck over to the edge of the outer lane, stopped and set the brakes. The shoulder of the highway was soft and muddy and would not support the truck; and it was therefore necessary to park on the right hand side of the concrete pavement. The truck was then about two miles north of Monce, and approximately 1,800 feet beyond route 50, which joins route 49. Route 49 was an improved concrete highway, 40 feet in width, with four traffic lanes. After stopping the truck Marcus switched off the tail-lights, to conserve the battery and facilitate the starting of the engine. He had connected an emergency gasoline tank, and was about to crank the engine when the rear of the trailer was struck by a car driven in a northerly direction by plaintiff, in which his intestate, a nephew, was riding in the iront seat. There was a terrific impact, and according to the evidence the truck and trailer, heavily loaded and with the braket set, were pushed forward some twenty feet. The Wash car in which plaintill was driving skidded sideways in a northwesterly direction entirely across the highway and came to a stop, even with or slightly north of the front end of the truck, but on the opposite side of the roadway. The car was practically demolished, and plaintiff's intestate was instantly killed. The evidence discloses that plaintiff was driving at a rate of speed admitted to be 40 to 45 miles an hour. The United States weather report introduced in evidence shows that

or trade control in the control and the control of s from a man, man, d'ill abien l'accel. L'accel. L'accellate din la company de with a compared to the second and the first the second of the second second to be an examined to the second cied, he for about Moreo, Malinesh , arean and a late a reservant the trained and the the training are the second are all the property and while Mi suddising one and in none don the on the black filter was th null of store in the real public constant out exemple will be bounds thereto a the call be the trained of the state of the training means and With a seas of this bile also be residenced and a resident ania from her bacypeta errollement and the hora steered will a longer ; for hillrow box tobour bus ACCESSOR OF THE CONTROL OF THE PARTY OF THE -irong them, comedite descert a filter descent and track that the terms of The tell 13.8% for the beyond noute for all and fein some for the tell the was an improved comprete his happy at the comproved transfer ent the base in the circulation and the care and since tail-lights, to concert the Destrict and all the Cartification or the section of years are a recommon banker and are said to ម្នាល់ ប្រសិន្តិស្តី ប្រើប្រាស់ ប្រទេស នេះស្ថា នេះស្ត្រ ស្ត្រីប្រាស់ ស្ត្រីស្ត្រី **អ្នកស្ត្រី នេះស្ត្** struck by a one drivon in a northerly circulated by a lackit, in ermil store that and an greath and configure a setataethi aid folda Monte . At sen . Lys 225 or . Miller ancen and . tember & ser bulue tran , won the his firm and deart privated , and hard bus the like it is sold at the first will stock yours and browse driving chiefest checops in a norther budy the arthurst. serous the initiary rate contract contract and all a lightly merth T the front and o the court of the ord the constitute of the court the toy. The car was op otioning deschicked, and an intifffe intropate est Library willed. The syldens consoled the library great are notice by of our od or breakings began to exter a second to teff whole were live al been onem trajer redinor between

the sun set on that day at 4:21 in the afternoon. It was plaintiff's theory that the accident happened close to 5:30 p. m.,
while defendants centend that it occurred between 5:00 and 5:15.
The time is meterial, because, under sec. 16, par. 17, chap. 95
of the Motor Vehicle act, as amended in 1923 (Illinois State Bar
Stats., 1935) motor vehicles, trailers or semi-trailers, are required to exhibit at least one lighted lamp which shall be so
eituated as to throw a red light visible in the reverse direction
"one hour after sunset to sunrise."

The issue of fact as to defendants' negligence and the care and caution exercised by plaintif and his intestate, or the lack thereof, was presented to the court and jury through numerous witnesses who testified as to the approximate time when the accident occurred. Upon the second trial all of the witnesses, except Paul Trotter, again testified for plaintiff, and with a few slight variations on immaterial matters, their testimony was the same at each trial. Likewise, all the witnesses who testified for defendants at the first trial, except dilbert Knaeder, again testified upon the second hearing. In addition thereto, defendants produced the following witnesses to fortify the theory that the accident occurred less than one hour after sunset.

Harry W. Bruns, chief of police of Richton Park for six years, testified that at five or ten minutes after 5:00, while in the vicinity of his home, he was notified by a passing motorist that an accident had happened down the road, that he immediately went to the scene of the accident, and in driving down from Richton Park, it was still light. He drove to the scene of the accident, which was three or four miles south of Richton Park, without lights until he had almost reached the place of the occurrence. Upon his arrival he sent his car back to lighton Park for the purpose of

entinal was as as each and thing of this and you dead and see new and all and the control of this villed and and a see the control of this villed and a see the control of the control of this control of the control of

The following of the termination of the interview of the interview of the color of

There y a street of the control of selected the control of the con

calling an ambulance, and he stated that the ambulance arrived about 5:20 or 5:30. Thile weiting for the ambulance he looked at his watch, and it was then 5:15 and just getting dark. As heretofore stated, Bruns did not testify upon the first trial.

Mrs. George Hall likewise testified for the first time at the second trial. She is the wife of George Hall, a witness at both trials. One stated that tegether with her husband and two children they had attended a girl scout meeting at Chicago Beights, to which adjourned about 20 minutes/ 5:00, and after leaving the meeting they proceeded south on route 49, arriving at the scene of the accident between 5:00 and 5:15; that it was just beginning to get dark, and they stayed there for five or ten minutes and then drove on to Monee, where they lived, arriving there about 5:30; that upon arriving at the scene of the accident, there was no occasion for lights, and that her husband turned on the headlights of his automobile only when he saw the other cars at the accident with their lights burning.

Chris Hall, who did not testify at the first trial, operated a garage at Monee with his brother, George. He testified that the accident on route 49, which occurred about "1,500 feet north of the "Y'," was about two and a half miles from his place of business; that he received word of the accident from his brother, between 5:20 and 5:30, and immediately drove the wrecking car out to the accident and brought plaintiff's automobile back to his garage. He remembered the time of the occurrence by reason of the fact that his brother was to relieve him at 5:30, so that he might go to supper, and testified that as he drove out to the accident it was just getting dusk, "between dark and dusk."

The fourth additional witness was Mrs. Dora Plumhoff, who had lived in Monee 29 years. She testified that she was at home when

(A indices of the control of the con

Here, completely and the limits of the color that the color the chart the color of the color of

The second by a second second

- Tived in Monce 29 years. The testified that the test it berrachen

a man came to their house, between 5:00 and ten minutes after 5:00, to inform her husband, a police officer, of an accident on route 49 northeast of Monee. Her home was situated on the highway. She, her son, her sister and her husband had just sat down to eat their supper when they received this information. The time was fixed in her mind because her sister spent weekends with her in Monee, and was accustomed to take the bus back to Chicago at 5:35, and for that reason they always had their Sunday meal at 5:00 o'clock. She stated that as she looked outdoors at the time the information was brought to them, it was not dark but just beginning to get dark.

In reversing the judgment and remanding the cause for a new trial on the former appeal of this cause, we said:

"Defendants contend that the overwhelming evidence shows that the accident occurred in less than one hour after sunset and consequently there was no statutory requirement for taillights and there was no negligence on the part of defendant, Marcus, in momentarily stopping the truck for the purpose of changing to the regerve tank for his supply of gasoline. As to this contention we may say that, in our judgment, the verdict finding defendants guilty of negligence is against the manifest weight of the evidence."

The evidence adduced by plaintiff on the second hearing was substantially the same as on the former trial, except that Paul Trotter did not testify. On the other hand, all the witnesses who testified for defendant at the first trial, except Gilbert Knaeder, again testified upon the second hearing, and in addition thereto the evidence of the witnesses, whose testimony has heretofore been set forth, strengthened and corroborated defendants' version of the time when the accident occurred. Under the circumstances, we are obliged to again hold that the verdict finding the defendants guilty of negligence is against the manifest weight of the evidence.

In addition to the question of defendants' negligence, the jury were also called upon to determine whether the plaintiff and his intestate were in the exercise of due care and caution. In this

a men come to their house, britaers S.CO and ban wiswers whose 5000, to inform her hundered, a politic or, of an accident on noute 49 northeast of lunce. Her last last two characted on the highway, the, her sen, her whete the last harband had fast and down to east their rupper when they received this information. The time was filted in her rind browne her wisten count westends with har in llose, and we securated to the the last or the last had a Chicago at 5:35, and for that reacon they always had their bunday meal at 5:35, and for that reacon they always had their bunday meal at the information was brought to they always had that a date the that beginning to pat date.

In revereing the judgment and remarking the course for a new trial on the former appeal of this cauce, we call

"Defendants contend that the overwhelming evidence shows that the mosters occurred in less than one has after tracet and consequently there was no statisticates as and there was no negligence or the part of or statisticates in momentuming the track of the track of characters that the part of or interest of characters that the part of character to the first the part of character to war the content of the respective that the part of the station of the track of the said of the ordents against of the ordents."

The evidence adduced by plaintain on the second hearing was substantially the same on an the demon trial, enemps that Feal rector is all the rither and testify. On the ether head, all the rither almost with testified for defendant at the second hearing, and in addition threeton, again testified upon the second hearing, and in addition thereby the refere of the witnesses, who a testimony has heartafore been set forth, strengthered and corresponded defendants version of the time when the couldent secured. Under the directors, we are obliged to again hold that the yearlest limitar the defendants are obliged to again hold that the manificat chief of the defendants.

In addition to the question of defendants' negligance, the jury were also called upon to descriming that the plaintiff and last intestate were in the energies of due care and counting. In this

connection it appears, from the evidence, that plaintiff was driving the Nash car at a considerable rate of speed, with only his dim lights turned on. These afforded him a vision of not to exceed 50 feet. Luhrsen testified that he could have a topped the car within thirty feet. Defendants counsel argue, as they did on the first appeal, that it was reckless and negligent for plaintiff and his intestate to proceed at 40 to 45 miles an hour, with only the dimmers of their automobile shining, and that they could have avoided the collision by the exercise of ordinary care. Luhrsen's testimony is the only evidence that bears upon the question as to whether or not the deceased was in the exercise of care and caution at the time of and just prior to the collision, and defendants contended upon the first appeal, and now contend, that the trial court should have directed a verdict for defendants upon the ground that the intestate was guilty of contributory negligence. In our first opinion we said that while this contention is not without force, it would hardly justify us in so holding as a matter of law, but that the verdict of the jury, so far as it indicates that plaintiff's intestate was in the exercise of ordinary care for his own safety, was against the manifest weight of the evidence. The testimony on this phase of the case was the same on both trials, and therefore we are again obliged to hold as we did in our former opinion.

As additional ground for reversal it is urged that the trial court erroneously refused to grant defendants' motion to withdraw a juror, discharge the panel and continue the cause, because of improper questions propounded to Marcus which resulted in testimony apprising the jury that he had made a report of the accident to the insurance company, and it is also argued that the court erroneously instructed the jury. In view of our conclusions upon the principal points of the case, and the consequent necessity for a retrial, we do not deem

.

As softlined ground it is in accordant to be accordant to is accordant to the trip of the trip of court error outly will not be ground to it and noted to accord to a unit of the properties and continue the organic, is a unitarity of the properties and intains accordant in the interpretation of the organic of the continuence of the con

a discussion of these points to be necessary, as the errors will undoubtedly be obviated upon retrial.

For the reasons stated the judgment of the Superior court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Sullivan, P. J., and Seanlan, J., concur.

en discussivian of these relation or be near a tag to the end of the second of the end on the end of the end o

Bullinen (1. 16) Len ver, est britan 12 ver ent ent ent en , un monet (1. 16) ver en rédort, marcaren es écuses

a III — iii — amidi-

38901

FAYE WILLIAMS, guardian of the estate of CHARLES WILLIAMS, Jr., a minor, Appellee,

V.

BOWMAN DAIRY COMPANY, a corporation, appellant.

49

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

2091. A. 6204

MR. JUSTICE PRIEND DELIVERED THE OPENION OF THE COURT.

Faye Williams, suing as guardian of the estate of Charles Williams, Jr., a minor, had judgment in the Cuperior court for \$9,500 rendered pursuant to the verdict of a jury, for injuries to the ward caused by a milk wagon owned and operated by defendant.

It appears from the evidence that August 3, 1935, Charles
Milliams, Jr., cometimes called "Chickie", then about five and onehalf years of age, was playing with some other boys in the alley
to the rear of his name at 104x Lill evenue, Unic go. One of defendant's horse-drawn wagons was parked in the alley, facing east
slongeide a telegraph pole, its uriver, william symbhaki, who had
been in defendant's employ only soout the and one-half weeks, having
left the wagon to deliver milk to various customers in the neighborhood. Through circumstances, as to which the evidence is conclicting,
the horse pulled the wagon forward and ran over the child, causing
serious injuries. The issue of fact presented is whether or not
defendant's horse was fastened or tied in accordance with are. 2007,
p. 783, of the Bevised Chicago Tode, 1931, which reads as follows:

"We vehicles shell be left unattended while the motor of gaid vehicle is running. It shall be unlawful to leave any horse or mule unattended in any street without having securely fastened said animal."

of Jacobs L. Makawang Coulded Parks (Mail

y the last the last the contraction

Major Allice , and the control of the section of the control of th

And the same of the control of the c

Pool. Thrown is sensely of fill on an actual horizon in continuing the file property of the continuing and actual the continuing and actual the continuing actual through the continuing a

deligneensts some man sinct are an El e la manarchuse like or a l'idea en els se l'idea en els se l'idea en els se l'idea en els se els

To the control of this behands on the first restained to the control of the contr

On this question and as to the negligence of defendant and the minor, plaintiff produced four witnesses and defendant two.

Thomas Foy, a witness for plaintiff, testified that he was walking down Seminary avenue, looked down the alley and saw Chickie and another boy near the wagon; that as the horse started to run Chickie tried to get away but fell under the wagon; that there was a telephone pole at the side of the wagon; that as he walked toward the wagon he observed a bridle on the horse's head, and saw the reins inside the wagon; that the doors of the wagon were open, and that no weight was attached to the horse.

Ruth Jennings, another of plaintiff's witnesses, testified that she observed the wagon in the alley near a telegraph pole; that Chickie was alongside the wagon, and, as the horse started forward, it ran over Chickie; that there was no weight attached to the horse, and nothing hitched to the horse's mouth; that when she first saw Chickie he was not doing anything in particular, and that she did not see him on the horse or wagon.

Thomas Slattery, also a witness for plaintiff, testified that he came down the alley about five minutes before the accident; that he passed about four or five feet from the horse's head, observed the horse and wagon standing there, and that the doors of the wagon were open; that the horse was not tied or fastened, and that no weight was attached to the horse's head.

Chickie's mother, Faye williams, testified that shortly before the accident she went to the garbage can in the alley, three or four feet from where the horse and wagon were parked; that there was nobody in the wagon, no weight on the horse, and that the horse was not tied to anything.

William Tyksinkki, driver of the wagon, testified on behalf of defendant that on stopping his wagon in the alley, he snubbed up his

lact lines . In we had not senter, Thinkshe good

Trouble Wellist a some Way, a final and the felleward, a cliffer of the last value wellists a some inflatory or shop, it with the along the solution of the so

្ស ស្រាវ ស្រីស សនិ ( ) សាំងសេង ស្រី សាំងសែល សាស សារាស សារាស (សាល្<mark>ក ១០៤</mark>

that the observe the elemental the the chargement and array policy that Chickin was elemental that can one orthogon at the chartens and the chartens and the chartens and the chartens and applied that the control and the chartens and continue the chartens and chartens are the chartens and chartens are the chartens and the chartens are the chartens and the chartens are the chartens are the chartens and the chartens are the chartens are the chartens and the chartens are chartens ar

"Themse done the class of the class done the class of the

manis.K ydarrasia dulik Sokrustant temaklika ayar toukka kisksisiko , ,

that on sucpring his seems in the climp, he caution up like

reins on a hook within the wagon, attached a chain, which was anchored to the floor of the wagon, around the spokes of the rear right wheel, and proceeded to make his deliveries; that when he return d the wagon and gone and he found it about two blocks from where the accident occurred, and that the chain, although still attached to the floor of the wagon, was dangling loose along the ground. hen testifying, he was still in the employ of defendant.

The defense proceeded on the theory that a chain, attached to the floor of the wagon, was fantened to one of the rear wheels by means of a hook, and was designed to prevent the wheel from turning, thus acting as a drag on the horse so that the vehicle could not easily be drawn along, and defendant sought to prove that Chickie had released the hook from the wheel, then climbed on the wagon, pulled the reins and caused the horse to start. In order to substantiate Tyksinski's testimony that he had attached a chain to the wheel, and to lend support to the theory that Chickie had, before stepping into the wegon and taking the reins, unfastened the chain, Charles Jerome, a boy seven years of age, was produced as a witness by defendant, and testified on direct examination that Chickie did something with the wagon before stepping into it and taking hold of the rains, and that as the horse started he (Chickie) fell to the ground and was injured when one of the wheels ran over his head. On cross-examination he told a different story, stating that he never saw a chain on the wagon, and that the idea of a chain was first suggested to him by L. Fdward Hart, Jr., counsel for defendant, before the trial. On redirect examination Jerome/the substance of his statement on cross-examination, as follows:

<sup>\*</sup>Q. (By Mr. Hart, Jr.) Now, Charles, what did you see Chickie do at the back wheel?

A. He got run over. That is all I saw.

The state of the s

and with the control of the case of the medical terms of the case per control of the control of the commit final of the view of terminates and the plant of the beautiful under average of the second of the second of the second and the se wayon, pully d bise rein. The samed the home so so ro. Wa order an out along the War in the animal of the animal the anamate of the state of the contract of the the sheel, and to less out to the section of the organical before balgoin these she are no attended in the same and a desagned the chains Simoles Estimates began a van geart of asse, all varecaeur or e a his lift death on Associate the death are beliefed to the each on the base of an one of a tide some side, this for a second paid of a second property and the side some side of the seine, and the ten the house at he (dufidite) if it to the mi . Frank will word in a fallocal world the earn source in a confine was born bornering waven of d d. andrade gross thought. a clot of spitchings- acro desile and mission to mild the first of my concentration of a chief of the any cost d to sir, by I. . We set inches , in., same, in the set will define to ones is a mid the representation of our live of the city riot of his steed and the second and the second and the second

no mong side total ( collecte ( voll ( to ( total) vollecte of the of the distribution of the of the objection

A. Na got and own. That the the and son all

- Q. Did you see him do anything with anything on the back wheel?
- A. Yes, a big iron there. A big iron thing on the wheel.
- Q. Now, did you see that, or did I tell you there was one there?
  - A. You told me."

The boy's testimeny on redirect examination is uncontroverted, and his testimony, together with Tyksinski's, constitutes all the evidence adduced by defendant on the question of negligence.

It is urged that plaintiff's evidence is of a negative character, and therefore not entitled to the probative value to be given the positive testimony of defendant's witnesses. Railroad accident cases are cited, helding that the negative testimony of witnesses tending to prove that they did not hear a bell or see a light, does not constitute evidence that the light was not there or the bell was not sounded, but we think the class of cases cited by plaintiff are more applie ble to the circumstances of this case for the following reasons. The defense is based on evidence intended to support the theory that although the horse was not tied, a chain fastened to the floor of the magon and hooked to the hind wheel, gave the same security as if the horse had been tied, and was therefore a compliance with the ordinance. It thus became an issue of fact for the jury to determine whether or not such a chain was actually fastened to the rear wheel, and the testimony of plaintiff's witnesses that they were in close proximity to the horse immediately rrior to the accident, and that there was no such chain, as not only competent but material to the issues of fact presented, both as to the violation of the code by the driver and as to defendant's common law neglicence. It was held in dest Chicago Street R. R. Co. v. Mueller, 165 Ill. 499, that where there are two classes of witnesses of equal intelligence, who have the same opportunity of knowing the

. The first of the

A. The constant is a second of the constant of the constant  $\lambda$ 

and the Manay will the common the Manager the Manager

to and band with the

one fies which past is suit think or excellent as interests subject the subject of an alignment of the subject of the subject

evito per a la qui encarita al calabir 1, della begge se del no and review of a rate of the beautiful and the recipient of the section of the ansands in along the size of the and the specific property of inner, the ter if if eric calc to be to be to such temps are need in the little and the second control of the second that the second the second the second the second that the second the second the second that the second the second that th Leads would believe to the first two common off to recently off of them death -intit is the fool' prof but amond but it in the me a bod over 🥶 tid in 15. To thinkledus bis book from the energy of nearly of filleron. The contact griffing for an entering of the form and almost and at reincompetitive first and section of the low of the art and sections to the case of the arm of a contract to the contract and the contract of law nagligence. It was hold in . gat Older a drawt D. Ne Ne Paraller, 10 line of the Colory while the aller to the colors of

ish bullered to valuation of the entry of the that Lower to

fact, and their attention has been directed to it, "then, although one testifies that the occurrence did take place, and the other that it did not, the latter testimony is not to be treated as negative," citing Rockford, Rock Island & St. L. R. R. v. Hillmer, 72 III. 235. Similarly in Chicago & Alton R. R. v. Pelligreen, 65 III. App. 334, the court said (p. 335):

"where one man swears that A struck B and another swears that A did not strike B, and both had equal opportunity to see and know the facts, the testimony of each of the witnesses is affirmative in the legal signification of the term. So the testimony of the brakeman in this case that he did not, on this occasion, push appelles, or any other somen, violently up the steps in helping her on the train, is not to be regarded as having less weight than appellee's testimony on that point simply because it is couched in negative terms."

(Citing C. B. & Q. R. R. Co. v. Caufiman, 38 Ill. 424; C. B. & Q. R. R. Co. v. Lee, 87 Ill. 454; and R. R. I. & St. L. R. R. Co. v. Hillmer, 72 Ill. 235.)

Chicago Cons. Traction So. v. Gervens, 113 Ill. app. 275, is to the same effect. Wigmore on Evidence, 2nd ed., vol. 1, pp. 1668, 1671, states there is no inherent weakness in negative knowledge, and that it may even sometimes be stronger than affirmative impressions.

In any event, it cannot seriously be contended that plaintiff's evidence was not competent, and according it the probative value to which the authorities say it is entitled it was a question for the jury to determine the their defendant's driver was negligent in allowing his horse to be parked in the alley sithout being securely fastened, both as a matter of last and in violation of the city ordinance. Pofendant asserts that the version of the jury and the judgment of the court is contrary to the manifest weight of the evidence, but from a careful examination of the record we are convinced that, so far as the facts are concerned, the jury was fully justified in returning a version in favor of plaintiff.

Plaintiff argues that even if the driver had fastened the

Announce each residence is the permitted and expension of the second and the seco

nografive. The alle and a contract observations of the contract of the contrac

The second control of the control of

(clube of the rest of the rest rest of the rest of the

is so the come can appear to the so the solution of the soluti

In any so set of near the set of the found of the set of the plants of the set of the se

reins and chain as he testified, the same does not constitute a compliance with the ordinance, because the ordinance requires that the animal be securely fastened, and not the wagen, and there is no contention that the horse was fastened or tied. There is evidence to support the conclusion that the horse and wagen were parked near a telephone pole, and it would have been a simple thing for the driver to have securely fastened the horse so the pole, as the ordinance requires. This was obviously not done.

Plaintiff argues that even if defendant's driver had fastened the chain to the rear wheel of the wagon it would not have prevented the horse from running away; that it would at most have placed a greater burden on the horse, and, perhaps, prevented it from running as fast as it might if otherwise unhampered, but that it could still have pulled the wagon along sufficiently to cause injury, and that tying the reins of the horse to the wagon furnishes no security. We think there is considerable force to this contentian, and that the jury may well have considered these circumstances in arriving at their verdict.

It is urged that the action was instituted by a person without proper authority, because at the time suit was filed the mother was not a duly appointed guardian. However, letters of guardianship were later issued by the Probate court. Defendant's counsel concede that an extensive search of authorities in this and other states discloses no case directly bearing upon the question whether or not, after the institution of a law suit, an order making the plaintiff a competent person to sue in the action sought to be maintained, validates prior acts. The statute recognizes the right of a mother to institute suit as next friend of the minor without any previous appointment by the court (chap. 64, sec. 18, Illinois State

estant end obelin an he believe, see a more and an activation of court into a court interest that the or the section of the or the section of the section of

the property and the slow of the property of the state of the

It is neglect that the new orders and the first of the sign of the victors of the start of the sign of

without being regularly appointed guardian, acts for the benefit of an infant. (Zazove v. M. St. P. & B. J. M. R. M., 212 Ill. App. 534.) Therefore, if the mother had designated herself as next friend instead of guardian, no question could arise, and since, ultimately, the suit was instituted for the benefit of the minor, even though the mether was designated as guardian, instead of next friend, does not indicate that she was an improper party or that the suit was improperly brought.

mitted the jury to include in its award of damages the loss of earnings of the injured boy during his minority. This specific objection was raised for the first time on the argument of the notion for a new trial. Plaintiff then made the father an additional party, and the complaint was amended as as to relinquish any rights that the father had to the earnings of the minor during his minority. A similar question was raised in Chicago Corew 19. v. eiss, 203 ill.

"Instruction Mo. 3 given for the appellee was intended to enlighten the jury as to the elements of damage proper to be considered in case they found for the appelles. The loss of earnings while incapacitated from work was included as an element of damages. The appelled was a minor on I his father was alive, and it is urged that the right to recover compensation for his services and labor was in his father, and hence it is urged that the instruction was erroneous. The appellant company, without objection, permitted proof to be introduced as to the ability of the appelles to carn wages, and did not seek to raise the question of the right of the appellee to receive his earnings until after the verdict of the jury had been returned. The question was first raised in the motion for a new trial. The suit was instituted and had been prosecuted to verdict in the name of the appellee by Rose "eiss. his sister, as his next friend. A motion was entered by said Rose weiss for leave to withdraw as next friend of the appellee, and another motion was presented by Franceise; his father, to be appointed as his next friend. These motions were granted, and Rose weiss withdrew her appearance as next friend and the father of the appellee was substituted in her stead, and he appeared in open court and accepted the appointment. \* \* \*

"The parent may relinquish his right to the earnings of his child, and that he has done so may be inferred from the conduct of the parent, (21 Am. & Eng. Ency. of Law, 2d ed., 1059) and the prosecution of a suit in the name of the child by the father as next friend, for the recevery of the earnings of the minor, would be equivalent to a relinquishment on the part of the father of the

dia net and to an arrandor of this englock of the arrandor of

complete the first of the limit of the last value of the embedder of the problem and the middle of the middle of the middle of the problem of the middle of the order of the middle of t

"Numbrant to a to the lammator of deserge trapper to be nowwidered in one they found for the conflict. The least of a milage
widered in one they found for the conflict. The least of a milage
while incorpositers of from ord to the first one as the wrot of deserge,
the appointer to a reiner as the difference of the training that the receiver of the difference of the first the receiver of the difference of the first the receiver of the difference of the first the receiver of the appointment of the appointment of the conflict of the conflict of the receiver of the conflict of the confl

"The percent may reliable he of he no the equippe of his of the percent may of his of the factor of the first take of the factor of the same of Letter the factor of the same of the same of the office of the first of the first

authority to collect or claim such earnings in his own right. It was so expressly ruled in Baker v. lint a rierre Mar uette R. R. Co., 91 Mich. 298.

See, also, American Car & Foundry Co. v. Hill, 226 Ill. 227; White v. Seitz, 258 Ill. App. 318.

It is urged that the conduct of plaintiff's counsel was so prejudicial as to constitute reversible error. No specific instances of misconduct are cited, the charges being general in character. We have read the arguments of counsel and find nothing therein which would justify reversal of the verdict and judgment on that a count.

Lastly, it is argued that cortain hypothetical questions propounded by plaintiff's counsel did not include all the undisputed evidence. hile there may have been some minor details omitted, this would not be erroneous, and if defendant was of the opinion that the omitted evidence was meterial, it should, on cross-examination, have propounded a hypothetical question including the emitted evidence. Not having done so, it is not in a cosition to complain for the first time on appeal. (Chicago City Rys. Jo. v. Bundy, 210 Ill. 39; Mahannah v. Bergfeld, 274 Ill. App. 97.) Moreover, an objection to a hypothetical question is limited to the ground specified (Todd v. Chicago City Ry. Co., 197 Ill. App. 544); and where the objection is not specific, and does not point out the elements alleged to have been omitted from the question, it is/the duty of the trial court to go through the record to ascertain whether all the clements were included. (Riverton Coal Co. v. Shepherd, 207 Ill. 395, 397.)

me find no convincing reason for reversal. The judgment of the Superior court should be affirmed and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

. The control of the

See, also, endougles to continue verilly on the continue only

The state of the control of the cont

The first of the control of the state of the

Here a still the constant of a first of a first of a first of a beneutoon over the military and some and a first of a constant o

. The car of the entrantition of climate trues relations will be

of the little of the well work at the relabelishment on finite of

bullitron, ". S., and conduct, . . conder-

39011

JULIA E. ADAMS,
Appellant,

W.

ISADORE STEIN et al., Defendants.

CHICAGO TITLE & TRUST COMPANY, a corporation,
Appellee.

CHICAGO TITLE & TRUST COMPANY, a corporation, (cross-complainant), Appellee,

V.

ISADORE STEIN et al., (cross-defendants).

JULIA R. ADAMS, 'cross-defendant), Appellant.

50

269 I.A. 621

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELLYERED THE OPINION OF THE COURT.

ipril 17, 1928, Isadore S. Atein and Fannie L. Stein, his wife, executed their seven principal promissory notes of that date, payable to bearer, in the following amounts and maturities:

"Note No.	Amount of Note	Maturi ty
A	\$ 500	April 17, 1930
B	500	April 17, 1931
B	1,000	April 17, 1932
D	1,000	April 17, 1933
E	1,000	April 17, 1933
F	1,000	April 17, 1933
G	12,000	April 17, 1933.

All the notes bore interest at the rate of 6% per amum, evidenced by interest coupons attached to the principal notes. The indebted-

```
LERE
                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         t
                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             (.13. . . 11. 1) 10 Km.
                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 SERVED DE LA LIVE OF DISC
                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 a corporation,
                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 the same to the same of the sa
                                                                                                                                                                                                                                                                                                                                                                                                                                                              eilm illet was-marked (confirmence)
                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     17
                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 C. In 30 MANY STOUTH
                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 ····
                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        1
                                                                                                                                                                                                                                                                                                                                                                                                                                                        The transfer of the total of the total
    this puint of the control of the con
viiic, compress their productional form of the production of the contraction of the contr
                                                                                           payed in the beauty in the silled and another another the authorization
                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           . 01. : foll!
                                                          T. J. .
                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          Ξ
                                                                                                                   1
                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               1 ... 6 ...
                                                                                                                   .
                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           11.6 8 1
                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               14 . 6 ...
                          11 4 Con 15 1
                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       Transfer of the
```

The notes blv. General to the second of the second meson and associated the second mesons the second mesons to the

ness was secured by trust deed of even date with said notes, conveying to Chicago Title & Trust Company, as trustee, certain improved real setate in Chicago. All the notes were owned and held by the Reliance State Bank (hereinafter referred to as the Bank) until June 36, 1928, when notes J. W. F and G. aggregating \$15,000, were sold to Chicago Title & Trust Company, cross-complainant herein, under an agreement by which the Bank undertook to subordinate the lien of the trust deed, in so far as it secured the payment of notes A. B and C. to the lien of the trust deed so far as it secured the payment of notes D. W. F and G. Thereafter all the notes were delivered to Tarle A. Layton, of the Chicago Title & Trust Company, who testified that he caused to be placed on the blue cover, which was attached and riveted to each of notes A. B and C. a legend in words and figures as follows:

"For valuable consideration the lien of this note and all other notes stamped with this legend, being an aggregate of \$2,000, both as to principal and interest, is hereby subordinated and made junior to the lien of notes numbers D, B, F and G, issued and outstanding under the within mentioned trust deed, and not stamped with this legend. The serial numbers of the specific note which have been so subordinated are numerated in a certain subordination agreement between The heliance state Sank and the Chicago Title & Trust Company."

Three months after sale of the indebtedness evidenced by notes D, B, F and G, the Bank sold note "C", for 11,000 to Mrs. Julia B.

Adams, the complainant. Upon default in payment of her note Mrs.

Adams accelerated the entire indebtedness, and april 12, 1933, filed a bill of foreclosure on behalf of herself and the owners of the other notes. The Chicago Title & Trust Company subsequently filed its cross bill of complaint, and the cause was referred generally to a master in chancery, who found the equities in favor of complainant, recommended foreclosure under the bill, and the dismissal of the cross-complaint. Upon hearing of exceptions to the master's report, the cancellor sustained those filed by cross-complainant, ordered the dismissal of the bill and entered a decree in favor of

Line I william to the man of the contract of the man and the contract of the c

The state of the s

Three months of the said of the factor of the state of the said of

or the dismissel of the bill one because a Peastmain and

cross-complainant. This appeal followed.

The question of fact involved is whether or not note "C", when purchased by Julia E. Adams, contained the blue cover with the legend of subordination stamped thereon, and whether she had notice of the subordination agreement entered into between Chicago Title & Trust Company and the Bank. Regardless of any conflict as to the condition of the note when it was purchesed by Mrs. Adams, the testimony is uncontradicted that at the time of the sale to Chicago Title & Trust Company of notes D, E, F and G, there was a definite subordination agreement between the Bank, as owner of the indebtedness secured by the trust dead, and the Chicago Title & Trust Company. It the time Mrs. Adams purchased note "C", a sales ticket was drafted by the Bank prominently bearing the notation "Subordinated Bond," and also the following:

"Principal allowed interest	\$1,000.00
To yield	\$ 997.00
Total due	\$ 970.40. H

This receipt was signed by Mrs. Adams and she testified that she read the receipt but did not remember having seen the notation "Subordinated Bond" thereon.

The sale was negotiated through anthony Cremerius, an employee of the Bank at the time of the sale. He testified that when Mrs. Adams bought note "C" it had a blue back cover with the subordination legend stamped thereon. There is evidence also showing that Cremerius is an attorney and represented Mrs. Adams fore number of years; that she called on him in his office in april, 1932, when he was no longer connected with the Bank, bringing note "C" with her, and asked him to collect it for her. She paid him \$15 at that time to defray the costs of filing suit. Cremerius testified that when Mrs. Adams brought the note to him on that occasion the blue cover was still attached to the note, but that no conver-

and alice in the state of the consequence of the consequence

The quarters were the contact of the

Titan than the relative to the contract the second of the second section.

Color of the Color

This receipt to right of the control of the circ testification of the receipt that all most amoved the receipt that all one receipt and the receipt the receipt the receipt the testine testin

no enclose we should not be suit to be suit and the originary of the series of the originary of the series of the

which is the case of the property of the continue of the

sation was had with reference to the fact of its subordination. Walter L. Mueller, another employee of the Bank, also testified that when the note was sold to Mrs. Idams it contained a blue back cover with the subordination legend stamped on the inside After the master had rendered his report, cross-complainant filed a petition alleging that it had newly discovered evidence bearing upon the issue of fact which was not theretofore available, and the chancellor rereferred the cause to the master, who heard the newly discovered evidence. It consisted of the testimony of la . and Mrs. Stein, the mortgagors. Isadore Stein testified that he saw the note in Cremerius's office some time in 1932, and that it then had a blue cover on the inside of which was a rubber stamp, about Your inches wide and two and one-half inches high. Both he and his wife stated that they had a conference with Mrs. Adams in 1931, in which she told them that she was corry that she had bought the note; that she had bought it aminst her better judgment, and that Mr. Cremerius had prevailed upon her to make the purchase even though it was a subordinated note; that in three subsequent telephone conversations with Mr. Stein complement repeated this statement, and each time used the term "subordinated note". Mrs. Stein testified that complainant called upon her in March, 1931, and that the conversation which ensued was substantially as follows: "Mrs. Stein: Now you come to take the roof from over me? Mrs. Adams: No, I did not come for that - I cannot do that, The Chicago Title & Trust Co. have a first mortgage. They can do that. I have a subordinated note. " Mr. Stein further testified that when he received notice of the foreclosure he asked Mrs. Adams what remedy she expected to obtain with a subordinated note; that Mrs. .dams did not deny the note was suborginated, but said the fact that it was subordinated could not be proved.

and the office of the or one of the Artist we set and religion of the grant of a long type in the conference of the flowers of the first of the umin a confidence of most section when any other with their tends to min THE PART OF THE PA -e o toto toto and spirit down to a toto real error me a modifie a membira for a valleble, and a colored or the form of the end of the Subtraction of the control of the best special of the sit of the section of erte par , lare desarro esta estimationes i lam esta la compassió esta for ome ( Alar Joriana we al esca esta were it thete believes miste To sedemine it as acree and a test of the color of the interior Minist that a state of the color decision with the color to day to the color wence There is not that it is not a within the one out from the property True on the Chia same dos made night mi grath and a wit with or only on a solicity of the solicity of an article of restriction of the solicity of de ministra a ministra de de la cemeral morte appre seculo ella di decembración note? . The following the control of Af for I will take the low field and the clock of the control of the control of wayn from the from the first has been been under this down the first of the confidence as At will be accessed to wheath of some controlled your arisest war. to entre the first and the first of the company of the first the first of the first The Indian a region of the contract of the con war, a dream ammedation only be relied bevices of now that រូបនិក្សា ស្រីកស្ថិតក្រុម៉ានេះ ក្រុម៉ាន់ ស្រាស់ ស្រាស់ ក្រុម ស្រែក្រុម ស្រែក្រុម ស្រាស់ ស្រាស់ ស្រាស់ ស្រាស់ ស align card card action returns and arbore to the company of the

Mrs. Adams, testifying in her own behalf, denied that the note had a blue back cover shen she purchased it. She also denied the convergations with Mr. and Mrs. Stein. when the note in question was purchased Mrs. Adams turned in for credit some securities which had not yet matured, bearing interest at 6 1/2%. She states that she never purchased subordinated notes and that she did not know this note was subordinated when she acquired it. It is evident from the record, however, that she was familiar with the purchase and sale of securities, having on numerous previous occasions had transactions with the Bank. Ind it appears fairly certain that, when notes D, E, F and G were purchased by Chicago Title & Trust Company, blue covers were placed on the subordinated notes A, B and C and the subordination stamp placed on the inside cover of each at the office of Chicago Title & Trust Jonyany. Layton testified that he instructed his stemographer to place these covers on the notes and stamp them, and when the notes came back to him that they each had a blue cover with the stamp on the inside thereof. .hen note "C" was introduced in evidence by complainant, it had no cover and showed unmistakable signs of having been mutilated. An examination of the original note shows that two pieces are town from the note in the elect places where rivets had evidently fastened the note either to interest coupen; or to the blue cover, or both. Notes D, T, F and G, the unsubordinated notes, which were also introduced in evidence, are each riveted with two fasteners, and contain blue covers. By comparison of the location of the rivets on these notes with the mutilations on note "C", it is evident that note "C" was torn loose from the fasteners by some one, and neither Mrs. Adams nor any one on her behalf make a satisfactory explanation of this mutilation.

Commenting on witnesses who testified as to the condition

the development of the state of the cope had a close to be not a contact and the contact and a is to be take and a part of a point of the owner of the to and the control of the second , the life we win made a walling for the stock wish what you will offe The first of the first of the control of the first of the appliante de la la regione de la completa en la completa de la completa del completa de la completa del completa de la completa del la completa de la completa del la completa de la completa del la completa de la completa del l constants that, when asset is, , ? and ? . The pure the fire his to be The part of the section of the contract of the erismi era mi bio die geween de la mit wedan his one de hus fi 🦽 podou meet finn, see for. I this enails to sell the cult to form to tove through the a residence and the second and the second and the second the second and the second the second and t on the filter of the second of the filter of the second of te . . J. Fi na mas anavel i magi alistici ali necessa has reves africa et allen des la depuis a principal et de la company note mithog to intervent consumn or to a large cover, end in the drawn Description of the mean statement of the following statement of the first territories of in the constance, are each rive to a limit for the constant, each in the interest of the limit covers. By comparing of the let the of the circumstation of the to the part of the derivate of the for the comparation of the nor any one an isan behalf only a salas group apoly a salas as one year ten

mulation on a final south the section of the analysis

of the note when purch and by Mrs. Adams, the master found that the testimony of Mueller and Premerius "is based not on positive recollections but on the routine of the business. The evidence shows that there was a contect being held in the Bank; that there were two teams selling bonds, notes and securities, with individual prizes for the largest sales. ith so many transactions taking place, it is hardly conceivable that salesmen could remember any one transaction." with reference to the testimony of Mr. and Mrs. Stein, the master considered it merely cumulative. Plaintiff's counsel seeks to discredit the testimony of these witnesses by showing that they had an interest in the litigation. Cremerius had severed his connection with the Bank and was no longer interested. Mueller was employed by the receiver of the Bank. The steins were liable as mortgagors on all the notes, whether subordinated or not, and they, as well as Cremerius and Mueller, cortainly had no greater interest than Mrs. Adams, who was seeking a dicree of foreclosure.

witnesses that note "C", as well as the other notes, had blue back covers attached thereto, that notes A, B and C had the subordination legend stamped on the inside of the covers, the physical appearance of the note itself when it was introduced in evidence, showing unmistakable signs of mutilation with no satisfactory explanation thereof, the receipt signed by Mrs. Adams when she purchased the note which she admitted signing and reading, showing on its face that it was a subordinated security, and the fact that she admittedly knew she was buying a 6% interest bearing note at a discount so as to make it yield 7%, it is difficult to believe that Mrs. Adams was unaware of the fact that she was purchasing a subordinated note. The circumstances rather lead to the conclusion that she purchased the note, knowing it to be subordinated, because it offered a higher rate of interest

The tensine of the problem of the form of the control of the state of the control of the control

Taking lines course on the state of the advance of the true bear witnesses that note "3", we that he did not the advance attended theorete, the anches A, Band Chad Card Cara when the stand attended on the incide of the terms, the pignised continues a critical of the stands of the note itself. Then it we introduced in the city of the stands of the stands. The stands of the stand

as an investment. It was conceded on oral argument that the principal issue between the parties was one of fact, and that if Mrs. Adams had knowledge of the subordination agreement she was bound thereby. As hereinbefore stated, we think there is abundant evidence to establish the fact that she had such knowledge, and therefore she was not entitled to a foreclosure as recommended by the master.

In recommending a decree in favor of Mrs. Adams the master said that "even if the blue cover was attached to the note at the time Mrs. Adams made her purchase, the character of the attempted subordination was not sufficient to charge the purchaser with notice thereof." He based this conclusion on the provisions of subparagraph (c) of par. 265, chap. 32 (Cahill's 1933 Illinois Rev. Stats.) which provides that the mortgage and notes securing a junior indebtedness shall bear across the face and affixed to each note a legend in red letters indicating that the incumbrance is a junior mortgage. If, as a matter of fact, the blue cover was actually attached to note "C" when Mrs. Adams purchased it, and she knew that it was a subordinated note, subparagraph (c) of the section of the statute cited by the master, would not exempt Mrs. Adams from the consequences of taking a subordinated note with notice, even though the subordination legend was not stamped on the note itself. The master also cites an amendment of the statute, made subsequent to the transaction at bar (subparagraph (d), par. 265, chap. 32 (Cahill's 1933 Illinois Rev. Stats) which requires subordinated notes to be so stamped. That amendment could not operate retroactively, and therefore has no application to the facts of this case.

Various propositions of law are urged and argued by counsel on both sides, but in view of our conclusions as to the facts we

In 1 1 1 was assent to the religion of the control of the section of the section

to program March as the form of the first page of the program of the รับสำนาน (การทำเมิด การการทำเรียนเกียน และ (อน กัดหมดู และโปลงการการการการการทำ un autorium e di un selluzione alfiberrati el 18 de 18 metalo de 18 de 19 and there are a larger on the real and reals appropriately (and all and all to the substitute of the contract of the contract of the contract of the , of the contraction, that he mail to be a sound bands word originate. of the moditor of the forth dispersy the author of the East of consists of the field of the responsing sounds of the consist which was a light to ton and harped than all modern the a mean never goodien with espen to the most of the sale with the first of the sale of a social at -more than a first of the control of regin (d), para tree, circle 32 , endalto 2002 fallonto Teva Stari -il an india . Here to a skips of the between the arminer he on that to head the eightein consider through the blue street assume shell to odern't out or mode

Tradicing properties and the energy of the energy of the contract of

uting of the a commence of the activity at the commence of

believe a discussion of these points unnecessary. After a careful examination of the testimony, the exhibits, and the circumstances attending this transaction, we have reached the conclusion that the chancellor properly sustained cross-complainant's exceptions to the master's report and that the decree in favor of cross-complainant was properly entered.

The decree of the Superior court is affirmed.

DICRES AVERNALD.

Sullivan, P. J., and Scanlan, J., concur-

the Information of the product of the control of th

militan, J. U., our content, U., descence

39022

RAIPH CARIBURG,
Appelled,

V.

H WD JSON PLAT FING COMPANY, a corporation,

Defendant.

Maciowell-Schering constauction company, a corporation, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

289 I.A

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

MacDowell-Scheying Construction Company appeals from a judgment rendered against it as garnishee in the sum of 229.

Henderson Plastering Company November 5, 1935. Execution issued thereon and was returned nulla bona. Thereafter the statutory affidavit for garnishment was filed and summons issued and served on garnishee Lovember 7, 1935, returnable November 12, 1935. Carlburg sought to garnishee funds in the hands of MacDowell-Loheying, garnishee, which were claimed to be due the Henderson Plastering Company, employed as a subcontractor to do work on property at 1050 North estern avenue, Chicago, owned by the Commonwealth Edison Company. Garnishee filed its answer in due course, which was subsequently amended, stating that the last work done on the contract between Henderson Flastering Company, and the garnishee upon the promises involved was performed about September 18, 1935; that Lyle Henderson, Kenneth Bayer and George Ryan were the laborers who performed the services for the Henderson Company



The transfer of a companies of the contract of

description of the solution of the continue of the solution of the continue of the continue of the solution of

the laborary the gesterment the verytock for the lesse that desire

in connection with its contract at the said premises; and that on and prior to November 15, 1935, there was que to the three laborers the aggregate sum of 3229, and that on the last aforementioned date. which was less than sixty days after the last work was done in the performance of the contract between Henderson Company and garnishee. the laborers then each had a right to file a claim for a mechanic's lien upon and against the premises for the respective amounts due and owing to them; that prior to Movember 15, 1935, the laborers informed garnishee that they had not been paid for their labor. and that unless they were paid before the expiration of the time allowed by law for the filing of their respective claims for mechanics' liens that such claims would be filed; that thereupon the garnishee requested and demanded of Henderson Company that it should immediately pay the laborers the respective amount. due and owing to them, in order to avoid the filing of mechanics' liens on their behalf and thereby hindering and delaying the garnishee in its efforts to obtain settlement from the Commonwealth Edison Company, owner of the premises; that in response to such request and demand the Henderson Company, on Movember 15, advised the garnishee that the respective amounts were due and owing the laborers, and authorized and requested garnishee to pay them. This request was made in the form of a letter, dated November 15, 1935, as follows:

"November 15, 1935.

Mac-Dowell-Scheying Const. Co., 20 N. Wacker Drive, Chicago, Illinois. Gentlemen:

The employees of the Henderson Plastering Company listed below have wages due and unpaid for work done in connection with the lathing and plastering of the Humboldt Perk Distributing Station at 1050 North Jestern Avenue of Shich H. V. Von Holst is the architect and the Commonwealth Edison Company is the owner.

The state of the s the second of the contract of the contract of the second section of the contract of the contra yes and the main of the control of the later than the control of t the first of the second of the problem that the control of the state of the control of the control of the state of where this no periodic and a valuable . There each no figure and another which are the fillenge write on a ray consect out the place is such which is a control to contain and the control in the of of boths to obstance at the section of a loss of a little section of the section of har the late discrease when or tunor, see all social problems and to measure the first company, as save bee M. , arrived the continued Ser trooting for a prince of the early with the early their attended oviding ear orth and the common of the state of the same of the common the term of the reselled to the angle of the control of the second of the second

Carrier Process

detail yregers: rigotach, no madret ont lo arvyolomo ant Li. rofdarman mi arod rene war dingen dus un asper event e palin india tent throught and to princetoning has not the total and the lil to runny names at the 1880.

You are hereby authorized to make payment and secure releases from these mon.

Lyle Menderson, 4020 Melrese St., Chicago, Ilis. 3109.00 Kenneth Bayer, 1435 S. Grove Ave., Berwyn, Ill. 60.00 George Lyan, 6622 Lakewood St., Chicago, Ill. 60.00

Yours very truly,
HUNDERSON PLASTIFING COMPANY
By John P. Barton,
Sec. \*\*

The answer further averred that on receipt of the feregoing an thorization the garnishee agreed to pay the laborers the respective emounts due them as soon as settlement was made with the Cormonwealth Edison Company, and that said laborers accepted the promise and resurence of payment and therefore refinined from filing their claims for mechanics' liens; that the authorization to pay, and the acceptance by the men to receive the amounts due them as aformald, constituted an assignment of the funds due the Henderson Company from fornishee, and therefore garnishee was not indebted to the Henderson Company.

been discharged upon its answer, on the theory that it was justified in withholding the sum due the three laborers to whom the Henderson Plantering Company admittedly owed money for wages, notwiths tending the fact that they had not actually filed their claims for mechanics' liens. Plaintiff takes the position that "a right to file a claim for a mechanic's lien is not the same as perfecting the claim by filing it under the statute," and that since the wage claimants did nothing to perfect their lien, the money due the Henderson Company, was properly held to be payable to plaintiff under the samishment process. To so hold, it would be necessar, to overlook entirely the authorization of sovember 15, 1935, hereinbefore set forth, by which the Henderson Company delivered to the garnishee a writing santaining its statement that there was due and unpaid to employees for wages, in connection with the lathing and plastering of the premises

HETT IN DER VON AUCHSTEIL DER ARTHEITSTERMEN, INTERNALANDEN BESTEILEN WERDE BESTEILEN WERDE BESTEILEN WERDE BESTEILEN WERDE BESTEILEN BE

winger on painteners the court of a court of a court of a court of the court of action of actions of actions

The first of a second of the s

MITTER ME

The first of the control of the cont

this considerate in the first of the constant of the constant

involved, the aggregate sum of \$229. The garnishee's answer avers that this statement was delivered to it within sixty days after the work was completed, and we accepted by the garnishee; that pursuant thereto the laborers were induced to forego filing their claims for liens, upon the assurance of the garnishee that their wages would be paid when settlement was made with the Commonwealth Edison Company, owner of the building; and it is urged by garnishee's counsel that this transaction perfected the lien of the laborers, and thereafter it become the duty of the garnishee to retain sufficient money to pay their claims. We think there is considerable force in the argument. It is pointed out that the statement contained in the letter of November 15 was a sufficient compliance with the statute even though it was not sworn to. Section 5 of the Mechanics' Lien act (chap. 82, Illinois State Bar Stats., 1935) provides that before the owner shall pay any amount to the contractor he shall require a statement under oath, and sec. 27 requires the owner to retain sufficient money to pay the claims of those named in the statement. It is argued that the statement thus performs two functions, namely, (1) it is a statement to the contractor that he owes for labor and materials only the amounts specified and is entitled to be paid that part of the amount due on his contract in excess of the claims for labor and materials shown in the statement, and also (2) that it is a notice of the claims of the parties named and constitutes an admission of indebtedness that would be competent evidence, whether under oath or not. Sec. 24, which provides for notice to be given by the claimant, does not require that it be sworn to, and therefore no greater formality should be required in a notice signed by the party acknowledging the indebtedness than by the claimant. Moreover, under sec. 34 it is not necessary that claimant shall sign the notice, but only that he

monaten, of selections, and the selection as any old groups, sold selections was begande smiller and our former like be on an entire a bit dark onome califate egreen of a contribution of the contr their office for firme, upon the court ace of the contense that thate mague made be noted and with amount that and and Compensed to Eddoor Company, owner of the building and it is eal to be than mother make sinks and the amon wheedshamen by bonus Lion of the Carlo Land Carlo Car there is somit to block to show a property of is also admit don a a dà il meio nevi erritoro di ficha concilenza destolilea gworm to. Cookkon G of Who Weshindor Ed in tot (chem. 8%; Thlingis yas yas Aleel cambo sel enchos tale achiocom (1866) sel estato smount to the contractor in shall regain a statement under activ and see. 27 recuires the concr to netain suffi elember to set the cit full temps at ill . tempetate and at beast packt to trisio stotement time performe two finactions, mently, (1) it is a striction of to the contractor that he ower Nor Labor and natural of a call the tue on his contract in excess fit the chine for leber and makerials of the pertion mare and complianted an addition of income that would be competent evidence, Notice without outh or wolf. Dece wit with the state of the second o that a military column of the -ad and judgmall ander whom only go begin in the transfer of ಕ್ಷಾಣ ಇತ್ತು ಕ್ಷಣ್ಣ ಕ್ಷಣ್ಣ ಕ್ಷಾಣ ಕ್ಷಣ್ಣ ಕ accessing that claiment thell cign the mether, but only thet he

shall "cause a written notice of his claim and the amount due or to become due thereunder, to be personally served on the owner," within 60 days after completion. The document signed by the Henderson Plastering Company, November 15, 1935, complied with this requirement of the statute. Under the averment of the answer it must be assumed that the claimants contacted the garnishee before that time and were demanding their money, and that they refrained from filing their claim for a lien upon the assurance of the garnishee that it would withhold sufficient sums to pay their claims.

It is conceded that the Henderson Company had not paid these employees who performed labor on the improvement in question. Consequently, it could not recover from the garnishee because the statute requires the garnishee to retain sufficient money to pay wage claims, especially after garnishee had been notified that the laborers were unpaid, and the respective amounts out them. The statement required by the statute was received in the form of a letter within 60 days after the work was completed and thereafter Henderson Company could not have recovered from the garnishee the sum : ithheld; or if the garnishee had then paid the Henderson Cempany it would have done so at its peril and been liable to pay a second time; and since the Henderson Company was not entitled to recover against garnishee the plainting was in no better position. It was so held in Hibernian Banking ass'n v. Merrison, 188 III. 279, where the court stated the general rule to be that "a judgment creditor garnisher cannot recover from a garnishee anything which the judgment debtor could not himself recover. This rule was approved in Schneider v. Autoist Mutual Ins. Co., 346 Ill. 137, where the garnisher had recovered judgment against one Allen arising out of an automobile accident. The garnishee signical designs of an alternation and so on like that, the the constant of the source of the constant of the

end to desire a side innael second element to de desire ellement e

Albertan 192 yan tak manakasi kasa matika manakasa ba Unase of Aspeca Lea planteine A dom of size impresentat in gestions Tomover a stability of the stability of most and appropriate the stability of the trang on the matter and hold in the state of a position of the analytical products rai dunit bulkikon kuru sea **sedainz**ar pedikingan alamake eta berara ana barara and action of them, ordered out in a fall of the restricted o Lo medicade ad la visco a monodine de los espisos adapar decomedade to the world be a lice aligned were stone only trail, any help exist he to display via continues of the orthogoness of eval for office present teaching. oldred and her dire to at the or soil destill year to to pay a succeed eliminate one since the Mondocan a region in not this light of the extra against grant frame the painting of the light of we herrison, iss. il. ave, allowe the corner wheter the gran i came ្នា នេះ ប្រើ ៩០៤០ ស្គ្រា ខេត្ត ១០ ១០៩៤ នេះបានក្នុង **១០១៤** ២០១០ ១០១៩ ប្រពន្ធ គ្នា និយាធិ ខេត្ត <mark>១៤</mark> allowers for the or costs or very but off steller making me continues recover." This sule on approved in commission at the curvil Inc. for, 3'6 Ill. 157, where the guestates hos every new factions

TO THE STATE OF TH

had insured Allen against liability for accidents, one of the conditions of the policy being that the assured would co-operate in the defense of any action brought against him. Allen refused to co-operate, as agreed, and the garnishee contended it was thereby relieved of liability under its policy. In sustaining that contention the court said (p. 139): "This is a garnishment proceeding, and it is elementary that plaintiff in error could not recover against defendant in error if Allen could not do so."

The garnishee's answer apprised the plaintiff and the court that the laborers were employees of the Henderson Company for and had we get due and unpaid/work done in performance of the contract with garnishee, and that the laborers were demanding their pay and claimed a lien on the funds. Under the circumstances, the court should have required that they be given notice of the proceedings and an opportunity to maintain their rights as provided by sec. 11 of the Commishment act. (Illinois State Bar State, 1935, chap. 62.) To enter judgment affecting their interests without requiring that notice be issued and served upon them constituted error. (Simples v. Mastutz, 2.8 Ill. App. 624; Chott v. Tivoli musement Co., 32 Ill. App. 244.)

Under the proceedings had it was incumbent upon plaintiff to move that such notice be given to the laborers, and having failed to do so the laborers were never afforded an opportunity to present their claims. Judgment of the municipal court is therefore reversed and the cause remanded with directions to proceed further in accordance with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Friend and Scanlen, JJ., concur.

The property of the control of the c

The contract of the contract o

Under the control of the had a control to the three heath agent of the major the agent of the major the agent of the control that the control of the agent of the control o

Priend end Jornheit, II., concur-

38964

CLARA WARMERE, Administratrix of the Estate of FRANK WARNERE, doceased,

Appellant,

V.

HENRY A. TORSTENSON,
Appelles.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

289 I.A. ( ) 13

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Flaintiff sucd defendant to recover damages for the wrongful death of her husband. The action was brought for the benefit of herself, as widow of the deceased, and for his minor children. At the close of plaintiff's evidence defendant filed a written motion to exclude the evidence and to instruct the jury to find defendant not guilty. The trial court allowed the motion and directed the jury to find the defendant not guilty. Plaintiff appeals from a judgment entered upon the verdict.

The amended complaint charges, in substance, that on

June 28, 1934, defendant was driving an automobile in a northwesterly

direction over and along Higgins Road near the intersection of Higgins

Moad and Cumberland avenue, both public highways in Cook county,

Illinois; that Higgins road runs northwest and south east, and Cumber
land avenue runs north and south; that plaintiff's intestate was

driving another automobile on Higgins road, a short distance north
west of Cumberland avenue, and was then and there in the exercise of

due care and caution for his own safety; that defendant caused or

permitted his automobile to strike the automobile which plaintiff's

alti 12 chille a william an delicali THE WALL COUNTY TO BE BALL ONLY TO dagoniced,

. San I Houce

ATTORNEY DE LE CONTRA

, turno tipo il comitti, comitti il masto ficiere e il comitti, , and

Thintlib enter teleprone to vecept of the course fill mindle mod afferoud to moders off the form worf to named in hymothe the brief to be lightly to the the second to them do on hardes consulted fieldning. The scole off to empreliate would tarrant and as the port that off obelieve of maison assist. I balk's become town of the set of the test party. The back control of the ton ungereal out this game that or will be described and antion off eniter. Planing and the comment of the comment of the comment of the ARREST OF STREET

The amended completed disagree, in actor many to a man June 25, 1954, defend no vary driving on one compile of a martin or before are the contract of the figure of the the trace of the term of the trace of the tra and curberland wromes parallo kinjawara in dook washing eredrive and controlled fro Security on and book a miggill dais quantiff driving another a troublic on Har has ready a charge it to see the IN THE RESIDENCE OF THE PARTY O The state of the s 

intestate was driving so that plaintiff's intestate was injured. as a result of which he died, on July 7, 1934; that defendant, at the time in question, negligently and carelesaly drove and operated his automobile; that he negligently and carelessly drove his automobile at a speed greater than proper, having regard to the traffic and use of the way; that he negligently and carelessly drove his automobile at a dangerous rate of speed; that defendant negligently and carelessly failed to keep a proper lookout, so that he failed to see plaintiff's intestate, who was lawfully on the highway. The complaint alleges that the deceased left him surviving his widow and three children, all minors, to whose support he had contributed, "wherefore, plaintiff asks judgment against the defendant for Ten Thousand Dollars." The answer of defendant states. in substance, that he was not muilty of the acts charged in plaintiff's complaint, nor was the alleged accident and resulting death caused through any negligence on his part, but that, on the contrary, the alleged accident, injury and resulting death were caused through the sole fault and negligence of plaintiff's intestate.

The trial court was of the opinion that the evidence failed to show due care on the part of plaintiff's intentate; that there was no evidence tending to show that Jefendant was guilty of negligence; and that there was no evidence tending to prove a proximate desident and his death.

Plaintiff strenuously contends that she made out a clear, prima facie case again to be adant, that the questions determined by the court upon the motion were questions of fact to be determined by the jury, and that the rial court was guilty of a serious error in directing a verdict for defendant.

The law applicable to defendant's motion is well settled.

9494 the twenty of election of the middle paint and the self and the over the first decrease and the description of the first tenth comments with bedering he from the manifest of the control of the first part of the self-decay and the self-decay and the self-decay and the self-decay are self-decay the tradition and are of the tary the last all all made and coreforming Prove the cuttered the at a few seven from the of appears the talk events northerntly and errel anthy doll of to heap a grap or lookent, as Ment neit so plint of a come, there exects she was a belief of privive and the sound of the confidence of the second of the property of the confidence of the confide had of thorogen about of the other line to the support in had been been aim -thering and Joseph parterned by the Matthewick Coroll testing , bedredied moo cool with an including the present off the the the Service will well the in rubatement the fire the color of the color of the cheart and for a pridle on our leadings boys the odd one committees at this epure of the second of the deal advisery what second second track of prematal decreases tuarry the alleged coald and injury on armidian is in the carried estronated a Militar last, in oracled as by thest alos and disposals

The trial court unit of the pointing of the river of the riversed follows to the trial of the point of the point of the point of the trial of the tr

a little time to be for all the second and the

"'A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The vidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, —we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Meynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489. (Hunter v. Troup, 315 Ill. 293, 296-7.) Mehan v. Richardson, 284 Ill. App. 493, 495.)

"The general rule is that negligence and contributory negligence are questions of fact for the jury, and so long as a question remains whether either party has performed his legal duty or has observed that degree of care and caution imposed upon him by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as one of fact. (Chicago, Bt. Louis and Pittsburg Railroad Co. v. Hutchinson, 120 Ill. 587; Lustin v. Public Service Co., ante, p. 112.) Before we can say, as a matter of law, that there was no negligence on the part of the defendant or that there was such contributory negligence on the part of the plaintist as to defeat recovery, we must be able to say that all reasonable minds must agree that the defendant was not negligent in his acts or that the injury was the result of plaintiff's own negligence." (Petro v. Mines, 299 Ill. 236, 240. Dec, also, Follard v. Broadway Central Hotel Corp., 353 Ill. 312, 322, 323.)

See, also, the late opinion of the Supreme court in Ziraldo v. Lynch

Co., 365 Ill. 197, wherein it is stated (pp. 199-200):

"Whether a plaintiff was guilty of contributory negligence is ordinarily a question of fact for the jury to decide under proper instructions. It becomes a question of law only when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach the conclusion that there was contributory negligence. (Thomas v. Buchanan, 357 Ill. 270; Mueller v. Phelps, 252 id. 650; O'Rourke v. Eproul, 241 id. 576.) A motion to direct a verdict for the defendant preserves for review only a question of law whether from the evidence in favor of the plaintiff, standing alone and when considers to be true, together with the inferences thich may legitimately be drawn therefrom, the jury might reasonably have found for the plaintiff. (Brophy v. Illinois steel 30., 242 Ill. 55; City of Chicago v. Jarvis, 226 id. 614.) We cannot weigh the evidence to determine, as a matter of fact, whether the plaintiff was guilty of contributory negligence, (Dukeman v. Cleveland, Cincinnati, Chicago and St. Louis Kailway 30., 237 Ill. 104.) and we cannot reject testimony as improbable innless it is contrary to some natural law. Letsche v. Chicago, Legrig and St. Louis Railway Co., 238 Ill. 240."

Pic per in the series of the entries of the contract of the contract of the series of

action of the control of the control

abe, also, the lets speaked on who was no court in gigglift or "Tagis." Co., A65 lile 187, herein is the late of [70. 182 - 600.):

The problem of the first transfer of the problem of

ter es son to considirántes de la considiránte de la constanta de la constante de la constante

The only living witness to the accident was the defendant, and plaintiff called him as an adverse witness under section 60 of the Civil Practice oct. He testified that he is a painting and decorating contractor, in Chicago, and that he lived in Evanstou; that he knew the deceased intimately and saw him frequently; that "before this accident happened his health appeared to be all right. He appeared to be just a normal person. He was a very large man. \* \* \* He never complained to me at any time of any illness. I saw him frequently;" that no one ever told him that deceased had any ailments; that on the evening of June 27, 1934, witness and acceased were together; that witness and deceased drove separate cars; that each was alone in his car; that deceased was in the insurance busi ness and incidentally did a little collecting for defendant and others; that on the evening in question they were engaged in collecting money for defendant; that about midnight they finished their business and started homeward; that deceased was going to his summer home at Gage Lake; that they proceeded along Higgins road; that deceased knew the streets better than the witness and therefore took the lead; that they were to drive on largins Road to Cumberland avenue. then cut across to Park Ridge, where deceased would keep on going north and witness would go east to his home; that they both intended to make the turn on Cumberland avenue if they recognized it; that the accident happened on Higgins road, somewhere near Cumberland avenue; that, at the time, deceased was driving his car ahead of the car of witness; that as they came toward Cumberland avenue each car was being driven at the rate of about thirty-five or forty miles an hour; that at the time of the accident and ima diately before it there were no other cars around there; that as they approached Cumberland avenue the witness was "fifty to seventy-five, say fifty to a hundred feet,

earth for Month partition to of here, he shall such talk the Paris of the contract of the second of t In the first of the first of the first of the collection which will to come that constant of one find the come to the advance of the come to If I stored a decision of the part of the previous factors with stored of AND A STORE OF BUT IN THE SECOND OF EMPIRED OF BUTCH OF THE STORE OF STORE OF THE The half the solid opening on the second particles in a second of the se him for the company of the case of the first that the control of the company of the control of t allmonths; the construct of this (V) and "and the construct of the construct of the construction of the co ್ಕೆ ಇತ್ತೇ ಕ್ಷೇಟ್ ಎಂದರ ಅವರಲ್ಲಿ ಎಂದು ಸಿಎಂ. ಎಂದು ಸಿಎಂ. ಎಂದು ನೀಡುವ ಎಂದು ಕ್ಷೇಟ್ ಕ್ಷೇಟ್ ಕ್ಷೇಟ್ ಕ್ಷೇಟ್ ಕ್ಷಾಣೆ ಕ್ಷಾಣೆ mand to remember and the state of the control of the proper of the property of the control of the state of the control of the have the bracket to the philips have though the bill of the brackets of the water ప్రామే గ్రామ్మలు గార్ ఏ గ్రామ్మన్ గారం - గ్రామం ఆటో ఉంది. కర్వారికి కార్ అతోకి అంది తే తోకి ఫడాగా**గోకిల** HTT DELIVER FOR PROBLEM CONTROL OF THE PROBLE But there is a series of the order of the series of the transfer of the series of the Cargo Intest times with grown and resemble this line to a grown of the consequence lost and State & while the them, who have the right arms in the third that of the outer out and notify themen . There's all the contract the second to be about the second to the contract the second to the contract toward to deal the state of the control of the cont offer at the car limit while the fullest the e. Since of the manerals the file: The state of the policy of the policy of the same and the file of the same and តី។ «ស្ទាន់ ខ្លាន់ ស ដែលនៃ ស៊ីយ ១០០០ ១០០៣ ភាពភា «សេ០១ នៅ ទូនី៤ ១០ សិសាក្មេស្សារី the time, decorped is a tiving bill our disess of the care of will been s that a sing come low, It didn't had a vinue as in our and bull, asiven કાર્યા છે. પ્રાથમિક કું છાલ્યો છેલે પ્રાથમિક મુક્કાલોક જોઈ તેમ કું ક્ષ્યોલીને જોઇ **કેટ કેટ કેટ કોઈ કેટ** ್ಯಾಂಟಿಕ್ಕೆ ಅರ್ವ ವರ್ಷ-೧೮ನಿಖ್ಯಕ್ಕೆ ಸ್ಟರ್ನಿಸ್ಟ್ ಸ್ಟರ್ನ್ಸ್ ಬ್ರಾಂಟಿಕ್ಕೆ ಕೊಡ್ಡು ಕಾರ್ಯಕ್ಷಣ ಕಾರ್ಯಕ್ಷಣ ನಿರ್ದೇಶಕ್ಕೆ ಕಾರ್ಯಕ್ಷಕ್ಕೆ ಸಿದ್ದಾರ್ಯಕ್ಷಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕೆ ಸಿದ್ದಾರ್ಥಿಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರಕ್ಷಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರಕ್ಷಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರಕ್ಷಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರಕ್ಷಕ್ಕೆ ಸಿದ್ದಾರಕ್ಷಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರಕ್ಷಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕಿ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕಿ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕಿ ಸಿದ್ದಾರಕ್ಕೆ ಸಿದ್ದಾರ್ಥಿಕ್ಕೆ ಸಿದ್ unio transcri an di dama trafficari, a spello in disti ganesia bisme in unio (and) in the set Agent in a Constantion on Agents as a meneral

right in there, behind him;" that the collision occurred after both cars had passed Cumberland avenue, probably seventy-five to one hundred feet beyond it; that witness was driving on the right hand side of the center of Higgins road, which is a wide, paved highway, a state highway, "a two lane highway with a center line," and on each side of the center line there is room for two cars; that both cars, at the time of the collision, were on the proper side of the road; that as they reached Cumberland avenue the witness was from seventy-Tive to one hundred feet behind deceased; that as the witness came to Cumberland avenue he noticed the intersection and thought that it was Cumberland avenue, and "why didn't Frank turn. I glanced over quickly to see if it was the intersection. As I turned my head back then he had evidently realized he had gone past this intersection, and he stopped with his brakes and I was coming up towards him, and I was probably twenty-five feet from him when I noticed he was stopping, and I slammed on my brakes as quickly as I could, and hit the back of his car square. At the time that I looked towards Cumberland I looked right. At the time that I looked towards Cumberland toward the right I had reached just about the center of the intersection. I was actually on Cumberland at that time. He was still seventy-five to a hundred feet ahead of me. \* \* \* He was slowing up. He was still in motion. As to how fast he was going at the time that I turned my head back, I would judge he was going probably firteen miles an hour. He was not going fast. He had slowed down from scmething like thirty-five or forty to about fifteen. hen I noticed him, I was about thirty feet from him. But I had not started to slow up as soon as he did. At the time I was twenty-five feet or so behind him, I was seventy-five to a hundred feet northwest of the intersection. From that time until I struck him I would say I went probably fifteen or twenty feet more.

· · · · · อง การทำใหญ่ที่และจาก ภูมิตำเนอนอง จูลวบบานการการอาการเกิดเก็บการการกุ โดยมี พบพอ คีรีอย์ definit control on antividual as meet with forth that faringof death becomes one been good and dealer ower alogic to andere ago to esta hasal " emil water a diin yonga il soni san a a' ay majir stat sa ay yoni, ti tempo on the more of other walk person and le some destrict remore will to your excludition and be write out in the same discussions with the source of the tent there is the second of the second of the note and from throught to the bearing bearing and the section of -recentled and explision of someth burghedrest or emporablish exit as some that sail has easier hedgeded and it was adjust one cottons wa this had been the sale and medically were impossing I Frank tant Lund or give our lan of and done bond up some I as anotions he had gone past this interacetion, and he wood at the his his tenter and I was coming up formers that the table of the table of the lest from him when " noticed in the prince and I . Lented an age sergappe rate aid to theid one did one things I as will sing as applied At the time time that I leviced to gain Tamberthall I heeked pigits, it was hade our And A Sinia all Danier brailed Curbon brail and Danie L tank out t -water to the compact of the interpretation of the contract of wall for retard to a standard Elice as of . said takt to back ver vo ... . He was and the ass on . or and . or a we show ... . to he biller : . Noved well you hears to be that a later seem and their the second of th ganof no svi - ghaidh dhil ghirishna marr hab basals bed all all will tell yould tooks and I wall besides I med. . most tit tweet :benit and do while are as a man well of bedands for had I jaw was twenty-live feat or so helind him, I are coverige live to a I Aldres world in with smooth . or thin I would say I wast probably fiffeen or turally fort more.

After I struck him I stopped right there. As to how far I pushed him, he rode about, I would say, firteen feet straight down the roadway. It could not be near seventy-five or a hundred feet after I struck him. His car never came to a stop before I hit it. He was still in motion forward when I hit him. He was going then about fifteen miles an hour. At the time I hit him I had slowed down. When I hit him I was probably going five or six miles an hour faster than he was. I was going about twenty miles an hour. and he was going slower than I was. \* \* \* Mr. McKenna (attorney for plaintiff): Do you remember that I asked you, 'Can you estimate the speed he was going when you did hit, meaning his car, 'A. I would say probably fifteen to twenty miles an hour. Do you think that would be correct, fifteen to twenty? The mitness: I would think so. I was going five or six miles an hour faster than he was, whatever his speed was. My brakes were in good condition. The road bed was in good condition. I was driving a 1933, five passenger Buick Sedan. \* \* \* I do not know the time exactly how long it would take me to stop if I knew that I was going to stop. As to the distance, under the above circumstances I would say probably twenty to twenty-five feet. \* \* \* Under the circumstances that obtained that night, and you not expecting anything after you do realize there is danger, then in what distance could you stop at thirty-five or forty miles an hour? A. I suppose it depends on how quickly you put on the brakes. If you know you are going to stop, you put your foot on the brake, and my foot was on the side of the brake. You would have to have ten feet more probably. More than the twenty-five or thirty feet that I was taking. That is merely a guess on my part, I do not know. It was not raining; it was nice weather. (. Do you remember I asked you at my office when taking this deposition, 'Now going at the rate of thirty to forty miles an

ledar, a coi to or a tecretic interpretation of interpretations. him, he rode wif itrie food mostile ear bine I etmed abor of anis that the hand a no owite proven transol ton almost it. Themboor sit that i o place and a to present any a map will be will be write. I apthe new also as somethic left nemer of those poster at files saw ... Manofi. Il a mili fif i emis des 🐪 . Tros ne cella mestall apeda ne combe miscore - will smis og Moskov, and I mini ske I moki skool with the self is the contract the self the self that the self the and he was point, allowers than I was a right followers (blickers and has lainthiff): No gor we when the T sales you, 'Oan you en alweis the agond bears, when you did hit to the trie of a read beage with cirici may pol toward an allow added to a motor the complete the bigo. Tallymore to the community of the control of the co ad mail without among a. a. file whe so svik paing use I .or wilds .fM .apidlines seem his en an antioned you about a sign will wow and ware road bed was in greed conditions. I was fringer | IVDs, life once cati man yeni wiseens emis ed a end ton en I wer a eden in selet weig of the of the oder mine and E during a the governor of our ower a linew Michigan The Companies of the state of the second party of the companies of the second party of the second trenty to trenty-litro fort. . I w Unit w the classant model that ob so; white this control of the confidence of the confidence of the confidence of resided there is dragan, that his this will brice omilines are no to the to 4 decomposite at a fund on safety track to svill-yttide ton calculate you may one is a liver brown of the control of the grant of the one in the sour root on the backs, and one are one the one the all the Tou would bay to here tem Weet more crebably, home than the twenty-five or thirty look that I was taking. But he me by se on my ment, H do not incor, it was no, making it is no as guides and no 1120 yet to may pedan I undecave may of 🧓 🔒 🗼 in specifican, thou going to the return of thirty to easition on

hour, under the conditions that were then prevailing, could you tell about how much distance it would take to stop going at that rate of speed with your car in the condition it was and the road bed in the same condition, and did you answer, 'Ch, I would say you could stop in, that is a hard thing to say, it depends on how you step on your brakes, I would say fifty feet you could stop.1 Do you remember answering that in my office? A. I think so, yes. \* \* \* My front bumper hit the rear of arneke's car. It hit his rear right square. Then his car rolled along, I would say, maybe fifteen or twenty feet, right straight down the lane, then all of a sudden swerved and went down in the ditch front and first. As to how far the point where is truck him was from the place where he landed in the ditch, as I recall it, it would be about fifteen or twenty feet, hardly that, ten feet. It is not very clear in my mind now. His car went in the ditch straight down. The front end of the car going directly down about a three foot bank, maybe four foot bank, and as it came to the bottom, it tipped against the post. When I struck him I was about seventy-five to one hundred feet north of the intersection. Then he went about fifteen feet more into the ditch." The witness further testified that after the accident he was unable to get the deceased out of the automobile and that he ran to a farm house near by for help; that after securing help the car was placed on its wheels and they got the deceased out of the car: that he then took him to /little hospital in Desplaines. Plaintiff offered evidence to the effect that the deceased was taken immediately to the hospital and put to bed; that he was afterward placed on a stretcher and taken to another hospital, and that until his death, on July 7, 1934, he did not leave his bed save on the occasion when he was taken to the second hospital; that he sustained fractured ribs and a fractured shoulder blade; that he was given in-

one of the contract of the con ্র প্রায়ের প্রায়ের বিশ্ব বিশ্ব হয়। ১৯১১ সালি হার সালে হারতার ১৯৯৪ সালে হার স্থানির বিশ্ব হার সালি হার স্থান go the of the property who has been been been been been been the course of th Tweeps. Turns many people of the of a blace of the section is not the good than en a frit on a called apt all and talk and section a mor of sign the state of which are the state empty will express discrebe by a soft of the commission of the first was also make the associate according to be a second of the second o of the angle teacher King to the could be the country to the count most resident to the state of a cold state of the state o and in open of Maximum, in increasing the second of The agreement of the stroke of the office of the part of transport and an extenditual adversarial transport of a super bulbs out and the goal of a little of a court board where a state of the first property coul cast andle each of the annual of the area in the area -Parking out out only and the control of the control dominate daily described a second of the contract of the contr which shall bod the new mention and a street will be desired and a men tolingular, wis worken broken broke by it offwer aut of thations off way that are mean to a firm from a serious will be less that as less their a mentage ties the latest will be a like the sale of the latest beauty from was odd glad entire that the first on the first property and the first of the first of the American 12 to the order of the medical form of the stage of the contract of the contra Storm . As the good by and the storm of the analytic fewers a pro-binosity Mis for May an Jean Value appealed and Jane with and new Yourse ាត់ក្នុង៖ កម្មការ នេះ ប្រាស៊ុឡា ទៀតថ្លៃក្រុង ក្រុង ខេត្ត ស្រាស់ស្រុក ស្រុក ស្រុក ស្រុក ស្រុក ស្រុក ស្រុក ស្រុក free boyes of the case of the force of the block of the fact of the case of the case of

jections of various kinds for his heart and the pancreas, i.e., for diabetes; that prior to the accident "his health appeared to be perfect." A physician testified that there might, or could be, with reasonable medical certainty, a causal relationship between the accident and deceased's death. It was a question for the jury to determine, from all the evidence, whether the injuries received by the deceased proximately caused or contributed to his death.

See our opinion in Straus Nat. Bank & Trust Co. v. Marcus, 274 111.

App. 597, where many cases bearing upon the subject are cited.

tention that a clear, prima facie case was made out by the evidence, and that the court erred in directing the jury to find for the defendant. We deem it entirely unnecessary to refer to them. After confining our review of the testimony for plaintiff to the limits prescribed by the settled law of this state, we are satisfied that plaintiff made out a clear, prima facie case against defendant and that the trial court committed a serious error in directing a verdict for defendant. We are at a loss to understand upon what theory of fact or law the court based its ruling. To sustain the instant judgment, under the evidence and the law applicable to the same, would be to deprive plaintiff of her right to a trial by jury.

The judgment of the Superior court of Cook county is reversed, and the cause is remanded for a new trial.

JUDGMENT REVERSED, AND CAUSE REMANDED FOR A HEN TRIAL.

Sullivan, P. J., and Friend, J., concurs

jestions of resident four a company of the best of the feet of the contract of the second of the second of the contract of the

Here to it is try the action and are according to it is it it is it.

Station in the court of the court of a court of a court of a court of the court of the court of the court of the court of a court of the court of a co

the independent of the suppositor course of cost occasing its reversed, and the case of varyout it varyout its var

Calliven, as de, can link ond, do, consulta

38975

MILTON H. FRIEND,
Appellee

V.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD. OF PERTH, SCOTLAND, Appellant. De GIOR COURT

APPEAL FROM SUP RIOR COURT
OF COOK COUNTY.

289 I.A. 6221

MR. JUSTICE SCANLAN D'LIVERED THE OPINION OF THE COURT.

This case was tried by the court, without a jury. The issues were found in favor of plaintiff and his damages were assessed in the sum of \$1,000. Defendant appeals from a judgment entered upon the finding.

Plaintiff sued on a policy of insurance for damages resulting from a furnace explosion. No point is made on the pleadings. Plaintiff pleaded a waiver of a limitation provision contained in the policy. Defendant admitted the furnace explosion but denied that any damages resulting therefrom were covered by the policy. Defendant further denied that it had vaived the limitation provision, and affirmatively pleaded it. Plaintiff had carried a policy of defendant of the same kind as the one in question since 1922.

Defendant contends that "the policy on its face excludes damage from an explosion in the facesee or five-box part of the boiler." It concedes that the form of the instant policy is the same that it would use to cover a furnace explosion. The first page of the policy contains that is called the "Tasuring agraement," at almost the top of the page. Also on that page appears the following, in boldface type, widely spaced: "(excluding loss of

ANY ARREST GOD OF PERRYAMAN EMER OF THE ST, SCOTL MO, . Sugilorn.

TO THE REPORT OF THE PROPERTY OF THE PROPERTY OF A PROPERTY OF THE PROPERTY OF

This care were tried of the cours, a should a surface and off all becomes out, not well but I dealers to work at barot area of more because of the court and appead on the back of the last the - FEMALONE |

Plaintiff card on a policy of hi arence for d mores reading from a furnace explosion. To solary is accessorable the the alle inall the continuous and claration and the first the test and best of Tild gur well reduct for helitarge booms is us of metalitat for helitat. dental and experience of the state of the st further drawed in , it has the tweether drawing aroving and -park - Teo tolkos a selecto o a kallonkala sel becomin ylavit mai tra SECT FOR THE RESIDENCE OF BUILDING STREET COME SEED TO STREET

relation on act at the policy of it are company to make demographs on one leaders in the language of like-room and the the of will make and included to a small a move of can librarial filled a small must be being by the control of the state of the control of the co he need (interfere) - the engage of the contract of an interfect

the kind described in section II, one excluding loss of the kind described in Section IV)," the word "excluding" being typewalttem. Section II and Section IV are on the first page, and defendant concedes that neither excludes a furnace explosion. At the better of the page reference is made to chedule I attached to the colicy. Defendant concides that there la nothing on page one that excludes a furnace explosion. It also concedes that none of the thirteen conditions contained upon page two have any bearing upon its contention. On page three appears what is called a "Schedule." At the top of the page appears the fallowing: "The cast iron boilers covered under this Schedule are designated and described as follows: (Italies ours.) Then follows a description of the object insured and the location of the same. Then follow four columns headed. respectively, "team Piping," "Cracking Coverage, "Furnace Explosion," and "Tuel." In the "Cracking Coverage" column appears the word "Included." A layman reading the language at the top of the " chedule" page would assume that the sole ourpose of the "schedule" was to describe the object insured. Defendant concedes that this "ichedule" page, standing alone, does not exclude a furnace explosion, but it contends that the following words, "Paragraphs B, C and D printed on the back of this sheet are hereby made a part of this schedule." at the bottom of the page, direct the attention of the insured to further provisions in the policy. It concers that paragraphs B and D have no bearing on its contention, but it contends that sub-paragraph (b) of paragraph C notifies the insured that if the word "Included" was not inserted in the column Turnace Explosion" in the 'Schedule," a furnace explosion was not included in the policy. We are not satisfied that sub-paragraph (b), when read by a layman, serves any such purpose. In Taplan v. United States Fidelity Co., 343 Ill. 44, 48, the court said:

<sup>&</sup>quot;By its assignment of errors defendant insists toon a

inite of the continuation of the continuation

in the page than a symmetric for a like a like a like a like a statele. If a refer to the same of the

The order of the special content of the state of the special content of the special content

T. Contains two and the contains the contain

energe de la companya de la companya

a soci esta al la remedia de

strict construction of the construous of its policy, but in construing policies of insurance the courts are inclined to lean against a narrow construction. (Termilliger v. fasonic accident ass'n, 197 Ill. 9; Monahan v. Fidelity Mutual Life Ins. Co., 242 Id. 488.) Equivocal expressions in a policy of insurance whereby it is sought to narrow the range of the obligations those companies profess to assume as to be interpreted against the company. (Magara Fire Ins. Co. v. Reamon, 100 Ill. 644; Colvesder v. Trade Ins. Co., 100 Id. 157.) The contract is always to be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity. Mealey v. Butual Accident ass'n, 133 Ill. 556."

In Travelers' Ins. Co. v. unlap, 160 Ill. 642, 647, the court said:

"It would not be difficult for the insurer to use language which, in respect to the question here under consideration, would be free from doubt. A policy of insurance should not be so framed as to be succeptible of one construction in the hands of the soliciting agent, and of quite a different one in the hands of the adjuster."

In Molkowski v. Continental Casualty Co., 284 Ill. Up. 505, 516, the court said:

"An insurance company has no right to so phrase provisions in its policies that the assured will likely be misled thereby." If defendant intended to protect itself against liability from a loss resulting from a furnace explosion, it could have easily so provided in the exclusion clauses on page one, by apt words that would have plainly apprised the assured that the policy did not cover any loss resulting from a furnace explosion. The labored argument of defendant, the devious way in which it makes the ambiguous language of sub-paragraph (b) an excluding provision, tend to show the weakness of the instant contention. The contract of insurance was drawn by defendant, and if its language is reasonably susceptible of two interpretations, under the sittled rule of law that interpretation must be adopted which will .et defeat plaintiff's claim. hile a careful, skilful insurance lawyer, after a reading of all the parts of the pelicy, would probably arrive at the conclusion that it was not clear that a furnace explosion was covered by it, we think that plaintiff, a layman, had a right to conclude from a reading of the policy that it covered a furnace explosion.

.e find no merit in defendant's contention that plaintiff

The state of the s

enter many to be to be for the first of the first the second of the first of the second of the first of the second of the second

in the source of the control of the control of the court was a second of the court was a second

nor of the confidence of the c ការការប្រាស់ពីទៅជានិការប្រាស់ពីក្រុងដែលបើ ១០ ខែការប្រាស់ ជា ប្រាស់ការ៉េប្រាស់ការបើការប្រាស់ការប្រាស់ការប្រាស់ក is gains when we use positions of the common mediators and the state of the control of the control of the state of t 100 - 1 galle, all 3 is a large of restrict and intelligental block THE RESERVE AND THE PERSON. the the state of the training one content to be jame green e . It is not got a fine facility in the figure of the second second terms of the facility of thrower, the form is the control of the interest of main and a personal faces. entre la la companya de la companya the old to allow the transport of the state of the allowing the state of en. 1. v fan de sele de fan de segon de on the angular section of this give the entries of this of the Idea of A. e. of the content of the land to entire the and the second of the second of the second of the second ្រស់ ស.ភ. ១០ ខណ្ឌា ១១១ ស្រុមនេះជាធិប្រសិទ្ធិស្រាំ ស្បី និស្ស និងសំខែ ១០ ស្វាល់ ស្ពេ

end of a madant of the prairie golden to reach a madant a process of the first

- It will true to the sector of section and section on and is a.

has not proven a waiver of the one year limitation provision of
the policy. The trial court had a right to find, under the evidence, that defendant's representatives negotiated with plaintiff's
representative for a settlement of the claim for a period of a year
or more after the explosion, and that defendant did not dony liability under the policy until the one year period fixed by clause
10 had expired. By this conduct defendant waived the limitation
provision. (see Allemania Fire Lis. J. v. Feck, 135 fil. 220, 226;
Illinois Live Stock Ins. Je. v. Esk., 177 fil. 447, 242; Chicago
& . I. R. Go. v. Guaranty Je. of . 1., 207 fil. 1.p. 483, 489.)
The cases cited by defendant in support of its in tent contention
do not apply, upon the facts.

The judgment of the Superior court of Cook county should be affirmed, and it is accordingly so ordered.

JUDGMENT AFT IRLED.

Sullivan, P. J., and Friend, J., concur.

និ ស្រាំ បែក គ្រួន នៃជា ខ្មែក គ្នាស្ថិត បានប្រជាជន សម្រេចបញ្ជាប់ ស្គ្រាប់ និង សមានបញ្ជាប់ សមានប្រាស់ សមានប្រាស ស្រាប់ និង សមានប្រាស់ និង សមានប្រាស់ សមានប្រាស់ សមានប្រាស់ សមានប្រាស់ សមានប្រទេស សមានប្រាស់ សមានប្រាស់ សមានប្រ ស្រាប់ និង សមានប្រាស់ ស្រាប់ ស្រាប់ សមានប្រាស់ សមានប្រាស់ សមានប្រាស់ សមានប្រាស់ សមានប្រាស់ សមានប្រាស់ សមានប្រ

The state of the s

ABROLL LO VINTO AT STELLO LA GAL LA CARBACLA MÁ BACHA GORAS EMÉL.

\*GRAPA PARA PARA PARA CONTRA CONT

arme, on got that have got a gravities

MATTIE HOLT, a minor, by BESSIE HOLT, her next friend, Appellee.

MARY SORGE.

Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

289 I.A. 622<sup>2</sup>

AR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in an action of trespass on the A jury returned a verdict finding defendant guilty and assessing plaintiff's damages at the sum of 315,000. The trial court caused a remittitur of \$6,000 to be filed and then entered judgment in the sum of 39,000. Defendent appeals.

The declaration alleges, in substance, that about April 20, 1932, defendant owned and controlled a certain flat or apartment building, consisting of several flats or apartments, which were rented to divers persons, and toat plaintiff resided in one of the apartments with her parents; that in the rear of the apartment was a wooden porch on the outer side of which was a wooden railing, watch porch and railing were controlled by defendant and were used by the tenents in the building, including plaintiff: that defendent carelessly and negligently allowed the railing of the wooden porch to become and remain in a damaged, decayed, rotten and unsafe condition, although defendant had notice of its unsafe condition or by the exercise of ordinary care should have had such notice, and that plaintiff, a minor of the age of seven years, while in the exercise of that degree of care which a child of her age, experience and capacity would exercise for her own safety, was lawfully upon said porch, the wooden railing broke and gave way, by reason of derendant's carelessness and negligence, whereby plaintiff "was thrown and fell off said porch a great distance to the ground to-wit forty feet." The declaration further alleges

Mary Both That with and the

and an IVS

. The second of the second of

A CONTRACTOR STATE OF THE STATE

ongo. A fing policinal exemiser of a final and of the color of a final all the color of the colo

The control of the co

#250 designs provided a construction of the co

the look of the last maintain above the transport of the property of

that by reason thereof plaintiff sustained certain physical injuries, describing them, and that she suffered and will suffer
severe pain and loss of health; that she has been permanently
maimed and crippled, and has sustained damages in the sum of
\$50,000. To the declaration and an additional count filed defendant filed a plea of the general issue, so that the ownership
and control of the property by defendant was conceded.

Defendant contends: "I. It was error prejudicial to defendant for the Court to admit evidence of the fact, that including the building where the accident hap ened, one owned fifteen buildings. This was evidence of the wealth or financial standing of the defendant. II. It was prejudicial error for the court to allow plaintiff's coursel over the objection of defendant, to take remarks in his address to the jury, concerning (a) the death of plaintiff's mother, (b) Whether plaintiff would be able to or afford to get any food. III. The admission of evidence by the Court over the objections of the defendant with reference to what effect, if any, the injury would have upon the plaintiff in bearing and derivering children was prejudicial error. That evidence was speculative. IV. Other inco petent evilence of scred by plaintiff was allowed in evidence over defendant's objection. Numerous motions to strike evidence were allowed by the Court, but the succept of evidence undoubtedly had its effect upon the jury, so that defendant did not have a fair trial. V. The Court compelled a remittitur of \$6.000 from the verdict of 115,000 returned in this case. ... ach relittiur did not cure the errors in the admission of evidence and the argument of counsel set forth. VI. The verdict, after the remittitur of \$6,000 is still excessive."

An examination of the six contentions discloses that the defendant does not contend (a) that plaintiff failed to make out a prima facie case, (b) that the verdict is against the manifest

A STATE OF THE STA

and the state of t 1. The substitution of the first of the particular of the profile of the profile of the particular of the p <mark>unnale fill to the decrease and the confirmation of the letter of the l</mark> and any other control of the control on the same that the manufacture of the consideration the same transfer and the consideration the same transfer and the constitution of the consti ——— if the state of the stat , which were the contract of t The thirty of the second of th and the state of t to the control of the shall be tell the

general control of the control of th

weight of the evidence, and (c) that the court did not fully and fairly instruct the jury. The contentions raised relate solely to the question of damages. To quote from defendant's brief: "The issue here is whether the Court erroneously admitted evidence prejudicial to defendant, and allowed plaintiff's counsel to make prejudicial statements to the jury. And whether these errors which resulted in an excessive verdict against defendant, were cured by the remitting regimed by the Court."

Four witnesses testified for plaintiff as to the manner of the accident; none testified for defendant. Eleven witnesses. called by plaintiff, testified to the effect that rails were out of the bannisters, that the boards were rotten, and the nails rusty. Fred C. Sorge, son of defendant, "managed the building." Two witnesses testified that prior to the accident they called his attention to the decayed and rotten condition of the rails and the bannisters, and told him that the porches at the back were decayed and dangerous condition and that the tenants were complaining about them, and that he answered that he knew they were in that condition and that he would fix them as soon as he could. The evidence is uncontradicted that after the accident there were three of the panels of the bannisters upon the ground where the child struck. Five witnesses, called by defendant, testified that the rails in the bannisters on the connecting porch were sound and that none was missing. It is clear, therefore, why defendant does not contend that the finding of the jury as to the manner of the accident and the condition of the porch is against the manifest weight of the evidence. We are satisfied that an honest, intelligent jury could not have returned a verdict for the defendant.

Prior to the accident the minor was a strong, healthy child. She fell sixteen feet from the porch onto concrete steps and a sidewalk. She was lying, after the accident, with part of

to in the second of the second

e production of the second of the state of t

por such anything the Common telephone the transfer played on the No. radia non comparte se transfer of the first of the same and the first terms of the second of the sec , political of with a fight that the transfer of the first and the second of the secon Pitter of the second of the sec Digital in the control of the control - International Communication of the Application of the Armer's Application of the Armer's Arm in the first time in the case of the second but the first pair in the man and the second of the mointines that The state of the second control of the secon the mile is a contract to the contract of the contract of . The service of the . I compare the second of the with displacement of the limit of the second . . In the real form your so were on three wast free it which the contract the contract

to the control of the

her body upon the sidewalk and her head on the concrete steps. She was bleeding from her mouth, nose and cars. She was in bed when the family physician saw her, within an hour after the accident. He found the following injuries: A deep laceration of the knee joint, a bruise on the chest, a bruise on the back below the waist. There were lacerations on the legs and a swelling of both jaws. There was a bruise back of the head in the occipital region. He sewed up the lacerations, sterilized and dressed the injuries, bandaged the legs, applied local medicine to the bruises and gave internal medicine. Blood was running from her ears and after cleaning them he found that both ear drums were ruptured. He found great swelling over the joinus of the jaws, what is called articulation, and also tenderness. Five teeth were knocked out and two or three others were split. The gums were torn a little from the teeth. He did not lind any dislocation of the spine, but "found considerable amount of tenderness and some swelling which indicated that it had been wrenched, twisted, traumatism of some type, due to the impact." The same physician examined the child a week before the trial of the cause. Questioned in respect to her condition he testified: "There was still tenderness in the lumbar region of the back and ankylosis of the jaws;" that "ankylosis is the uniting of the two bones that form the joint, due to the undergrowing of sear tissue, fibrous bones which unite the two surfaces of the jaw." She has an imperfect gait in walking. She lists her right side in walking, so that one shoulder is lower than the other. The jaw has about five-sixteenths of an inch opening between the teeth, and it has no lateral movement. It has a vertical motion of about five-sixteenths of an inch; the normal notion would be about two and one-half inches. The ankylosis of the jaw is persament. A-ray pictures of the child had been taken and another

and the experience of an experience of the second second 🕳 in the first of the control of th the control of the state of the and the second of the second o , and the first of the control of th . The second of the control of the co The second of th er tel traditional, and the second of fitting and the second ្នាក់ នេះ ប្រជាពលរដ្ឋ នេះ ប្រជាពលរដ្ឋ ប្រជាពលរដ្ឋ និង ប្រជាពលរដ្ឋ នេះ ប្រជាពលរដ្ឋ នេះ ប្រជាពលរដ្ឋ និង ប្រជាពលរ into an interest of the second property and the second and the second of the second o 1. Lorentz de la companya del companya de la companya de la companya del companya de la companya del companya de la companya de la companya de la companya de la companya del companya de la companya del companya de la companya de la companya de la companya del companya de la companya de la companya de la companya de la com Consider the control of a control and a control process the following the world arrove the meither 

real of the second of the following the missing years with the second of the second of

doctor, testifying as to what he found in the pictures, stated that he found as abnormal relaxation of the articulation between the left side of the pelvis and the sacrum; a narrowing of the pelvis in the region of the left center line, nearer the median line on the right, producing an overtilting of the pelvis; dislocation of the lower jaw on both sides and its articulation with the skull, and anterior dislocation; and a sclerosis condition in the upper part of the lower jaw bone. Still another doctor testified that he examined the minor about nine months before the trial and found. objectively, that there was a rupture of the left ear drum, ankylosis of the lower jaw, deformity at the articulation on both sijes of the lower jaw, that due to the ankylosis her jaw would open only about a quarter of an incn, that she had no lateral motion of the jaw due to the ankylosis, that the left side of her pelvis, the hip bone, was higher on the right side because of the upward position of the pelvis; that the left leg was between one-half and three-quarters of an inch shorter than the right leg. This doctor further testified that he was unable to pry open the minor's faw even with a "tongue de pressure." Her mother testified that the child cannot eat hard food and that it is necessary to prepare a special soft diet for her, that she "slobbers" when she cats; that "sne cannot use a spoon directly to her mouth, she turns the spoon sideways. " The father testified that one of her legs is shorter than the other. A doctor representing the defendant was allowed to examine the child. His testimony, in substance, is to the effect that claimtiff was a normal child of approximately ten to fifteen years of age and that from his examination of her and the X-ray photograph he was unacle to find anything absorted in her physical make-up. This case was tried by one of the ablest and most experienced judges on the Cook county bench. He saw this child and

and the second of the second o and the first term of the control of Service of the servic to the first the second of the are of the second of the second of the second of ed a firm due ou or a constant of the constant ⇔isk. Galiko tabilio komile oran di ili no de medili sin posco cir THEO DESCRIPTION OF THE STATE OF THE STATE OF ST to the bold to be not something The state of the s and the state of t amor out to the country of the amora was a cause and grifts musical the first and a collision of a specifical section. per eller generals on the service of the d as while a love on the second of the first of a root of the best that the second of th THE THE THE THE THE PARTY OF THE PROPERTY OF THE PARTY OF i viet e vere e e e e e e e delega delle es ellèga e e e e e e e e war fare in the state of the appropriate water on the contract of ા કાર્યા કરાયા કરવા તેમ જ આ પણ કાર્યા કાર્યા કાર્યા કાર્યા કાર્યા કાર્યા છે. તેમ કાર્યા કાર્યા કાર્યા કાર્યા ક માર્ચા કાર્યા કર્યા ક

heard the testimony in reference to her condition. It is evident that he did not believe the testimony of the doctor who testified for defendant. Neither do we believe that testimony. It was his judgment that \$9,000 would probably compensate the child for the injuries sustained. We see no good reason to sustain the contention that the amount is still excessive. The trial judge was of the opinion that the verdict of the jury was not the result of passion and prejudice, and we would not be warranted in holding to the contrary.

We will briefly refer to the points raised by defendant. As to contention I: John S. Price, a witness for defendant, on direct examination testified that he was in the real estate business, connected with Bowers & Baldwin, that he had inspected the building in question prior to the date of the accident and afterward, and that the rails, bannisters, etc., were in good condition. On cross-examination he testified, " /e mad charge of that building." meaning Bowers & Baldwin. The following then occurred: "Q. For Mrs. Sorge, how many buildings did you manage for mrs. Sorge? Mr. Biossat (attorney for defendant): It does not make any difference. The Court: He may answer. Witness: About fifteen. " He further testified that he did not make all the inspections of the buildings personally; that ar. Sores, defendant's son, worked for the firm and was the manager of the omilding in question and had charge of the collections in the building; that the firm " ... and ged the building generally;" that there were ten employees of the firm who made inspections of the buildings. Defendant contends that the court erred in allowing the question as to now many buildings he managed for defendant to be answered; that the fact that defendant owned fifteen buildings might be considered by the jury as evidence that the defendant was very wealthy, and that questions of that character have been conneaned by the courts. The instant

## 20 ( 1 20)

local rice less and any success of the extra content of the extra conten

and the state of t ness, competed the foreign of the control of the co and a set tent to a line of the contract and a different of the consider the best of the contract of the contr n e e la libraria de la companiona del companiona del companiona del companiona del compani TO WELL TO THE THE TOTAL OF A CONTRACT THE TOTAL CONTRACT I'm. Monant (antourney that the applications of the contraction of the considered to the transfer of the first and the selection of the selection and of the best there were never that the course is a course of the course was a for the fire as the forest was to be such that the forestigner, to. A selection as a fine dated was all months of too and the parado the following and many street the solid following the foll tion with and the children of the children of the children children. the court error is alter in , as actaion a true trop radiotion with the good that his control and a sugar spainties a surfit become done ಗೀಡದಲ್ಲಿ ಕಣಕ್ಕೆ ಕೆಟ್ಟ್ ಕ್ರಿಟ್ಟಿಕ್ ಮಾರ್ಡ್ ಕ್ರಾಪ್ ಕ್ರಾಪ್ ಕ್ರಿಸ್ಟ್ ಮಾರ್ಟ್ ಕ್ರಿಟ್ ಕ್ರಾಪ್ ಕ್ರಿಸ್ಟ್ der een voor gestlook in ge han die ook in in verd med med tend dand

complaint appears to be an afterthought, as the able counsel did not deem the question, at the time it was put, important enough to make an objection to the same. We are satisfied that counsel for plaintiff, in putting the question, did not intend to show the wealth of defendant. The plain purpose of the question was to test the witness's knowledge and memory as to the inspections he claimed to have made of the back perch.

As to contention II: It is a sufficient answer to this contention to say that we have already held that the amount of the judgment is not excessive.

As to contention III: All questions bearing upon the subject as to what effect, if any, the injury would have upon the plaintiff in bearing and delivering children were sustained by the trial court, save one, to which we now refer. During the examination of Dr. Ballinger, a witness on behalf of plaintiff, the following occurred: "Mr. Eascha (attorney for plaintiff): Q. Can you tell us with any degree of medical certainty whether the bony pathology shown in Plaintiff's Exhibit 1 could or would be sufficient to interfere with the patient searth, and delivering children in the normal way? Mr. Biossat: I object to that. The Court: He may answer that: whether it could, might or could. The Witness: Yes, it would have an effect. The Court: It might or could have. The Witness: It might or could. The Court: That is the extent to which you can testify under the law." Counsel for defendant made only a general objection to the question. That is not sufficient. It is the settled rule of law in this state that an objection to the basis of a hypothetical question must be specific (Chicago Union Truction Co. v. Roberts, 229 Ill. 431 ), so that improper matter may be eliminated from the question or essential matters included in it. Objections to hypothetical questions put

The letter of the state of the

en la la contra de la la companya de la contra del la contra de la contra de la contra de la contra del la contra de la contra de la contra del la contra de la contra de la contra de la contra del la contra de la contra del la contra de la contra del la contra de la contra de la contra de la contra del la contra del

and the company of the contraction of the contraction of the

trial court, or violation is also as a surface fair. time of Dr. California, and about the relation of the state of the sta at show that all the field of the second of the control of the problem to in the later of the first section of the property of the prope of the property of the first board of about the distribution of a constraint rope I with Directing 12 to our children (Chicago into the stire of the rot was the line little, and the country of the contract of

to expert witnesses must specifically point out the grounds there-(Lye v. Clark, 193 111. App. 505.) An objection to a hypothetical question is limited to the ground specified. ( Todd v. Chicago City Ry. Co., 197 111. App. 544. See also manannah v. Terrifeld, 274 111. Apo. 97, 103., As stated by our Supreme court in Riverton Coal C. v. Snepherd, 207 111. 395, 397, where the objection is not specific and does not point out the vice of the question, it is not the duty of the trial court to go through the record to ascertain if the question is a proper one. The criticism now made of the question is that there was no evidence upon which to base the question. Even if the present criticism were justified it would avail the defendant nothing as it was the duty of her counsel to call the attention of the court to that fact at the time of making the objection. (See Chicago Union Traction Co. v. Roberts, 101 Ill. App. 476.) mowever, there was sufficient evidence in the record upon which to base the question.

We have carefully considered the points raised in support of contention IV and find no substantial merit in any of them.

Some of them are so lacking in merit that it is surprising that they should have been made.

What we have already said disposes of points V and VI.

The judgment of the Superior court of Cook county is
alliamed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

es expert element a come a constant and a constant

of continuity and a line be contact. That are set to deep on the continuity of the continuity should be the continued to the thought the continuity of the c

A. C. C. Beach the

athivon, 2, in this pay where

39125

WILLIAM L. LEWY and SIGMUND ROTHBLUM,

Appelleos,

V.

wastern union T L Graph CO., a corporation,

appellant.

Cross-Appellants.

56

APPEAL FROM SUPPRIOR COURT, COOK COUNTY.

209 I.A. 622<sup>3</sup>

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This case was tried by the court without a jury, the issues were found in favor of plaintiffs, and their damages were assessed at \$500. Defendant appeals from a judgment entered upon the finding. Plaintiffs have prosecuted a cross-appeal, praying that the amount of their damages be increased.

Plaintiffs were copartners, engaged in importing and selling dismonds. Notablum was the buyer and Lewy the salesmen. The suit was based upon a cablegram, dated June 16, 1935, and by Lewy, in Chicago, to othelum, at Antwerp, Belgium. The message as filed with defendant read:

"S. Rothblum

Diamant Club

Antwerp Belgium 1901 10000 mailed 4000 robbed in Chicago of around 30000 feeling well inform family no trouble insurance being taken care of dont worry.

William Lewy"

Defendant, in transmitting the message from Chicago to New York, made it read:

TO TOT

3 7

em leamngroon a

First No. 1 and L. U.S.

en, Namen and San and San

. For the second of the second of the second of the second second

ili per en al como de la como de

Limitify disputes, a string or an entropy of the first and conflict or an entropy of the string of t

GHAL CHARLES

prit and the contract of the state of the contract of the cont

CHARLES SEED!

Contendently in transmitting of the court of the following the first of the following the content of the court of the cour

theory of observe

"S. Rothblum Diamant Club Antwerp
"Sold 1000 mailed 4000 robbed in Chicago of around 3000 feeling
well inform family no trouble insurance being taken care of
dont worry

William Lewy"

Defendant's answer denies practically all of the allegations of the complaint, including the one that alleges the wording of the message as it was delivered to defendant. However, the manager of defendant's office at the Congress hotel, who received the message from Lewy, admitted that when she received the message it was worded as plaintiffs claim; and defendant, prior to the trial, admitted negligence in transmitting the message and tendered plaintiffs a check for \$3.20, the amount of the charge it made for the transmission of the message, which tender was refused. The evidence of both sides shows that Lewy frequently sent cablegrams to Rothblum through defendant's office at the Congress hotel. Plaintiffs had been purchasing practically all of their diamonds in Antwerp, as it cost them approximately ten per cent more to purchase like diamonds in New York, and they claim that due to defendant's negligence in the matter of the wording of the cablegram Rothblum, the buyer of the partnership, deemed it necessary to go to New York; that plaintiffs were therefore compelled, during the months of July and August, 1935, to make ninety-five per cent of their diamond purchases in New York, at the New York prices, and they thereby suffered damages in the amount of \$2,024.22; that because of the time consumed by Rothblum in traveling from Antwerp to New York and return, the partnership sustained a loss of profits which it would otherwise have earned during that time.

Defendant argues that the cablegram does not show upon its face that it relates to a commercial transaction and that therefore damages suffered as a result of the errors in the transmission of the message cannot be recovered. After a careful consideration

giffice of the control of the life of the control o

mand in the Life and the second of the laterage and the contract of the laterage and the contract of

to print the second and any to the capture that are one to and a first tree to the order with our community and a consolition of a subsection like The state of the s A out proff of all his office of the land of the first first first of the contract of the cont The service of the second of the service of the service of the second of the second second second second second tine mesosyes, shippy that it will be a little of the off open to the file. -the series but the constant of the series of the constant of r or . The grant of the in I do not be gilled bear intension rid the near of it is likely deal to be an it for million would be a fixely unit medicar of the wearing of the orbit greek to believe the trape of the word thorses one committee, during the last that continue is the last three committees the . Or . I had also should be made in the compact of the contraction of at the first work priors, the time, is in the prior and work prior and the amount of Carlot State that I begin be seen of the state if traveling arous the control of the constant and a reference in went a valuable and color almost a label utilizing he seed a contraction

and note that the the control of the company and the company and the control of t

of the rather strained argument of defendant in support of this contention, we find it without merit. We think that defendant should have known from the phraseology of the message that it related to business and that a pecuniary loss would probably result from an incorrect transmission.

Defendant introduced in evidence its rules, regulations, tariffs and classifications that it had filed with the Federal Communications Commission, and it contends: "That portion of the tariffs which the defendant contends is applicable in this case is that this was an unrepeated message and that the company was not liable for transmission at the unrepeated-message rate beyond the sum of \$500, nor in any case for delays arising from unavoidable interruption in the working of its lines or for errors in cipher or obscure messages." As the trial court fixed the damages at \$500 it is unnecessary for us to consider the contention of defendant as to the maximum sum that could be awarded for damages. There is no claim that there was any delay in the delivery of the message, and defendant's argument that it was a code message, the meaning of which was unknown to it, is without merit. Indeed, the able counsel for defendant centended before the trial court that the cablegram was not a code message.

The major contention of defendant is that "plaintiffs! damages are too speculative, contingent and conjectural." The case was tried by an able and experienced judge and at the conclusion of the evidence he made the following statement: "Here is the way I feel about it: Because of the rather unsatisfactory character of the proof as to what the damages definitely are, a I am not very satisfactorily convinced on that - it makes me give greater weight to the limitation of \$500, and I think I would be generous enough in giving that limit of recovery, if I accept the defendant's theory

or size a district the first of a specific of an area of a constant and a constant of a constant of

Find the control of t

The major contration of the and the solution of the majorithm of the segment of t

of what the limit is. I am not sure whether he is right in his contention, but I think \$500 is fairly ample, so that will be the finding for the plaintiff." We see no good reason to change the amount of the damages fixed by the trial court. If it be granted that the evidence as to the alleged damages is of a somewhat unsatisf every character, nevertheless, we think, in view of all of the facts and circumstances, defendant should be satisfied with the finding. We also think that we would not be justified in sustaining the contention of plaintiffs that their damages should be increased. Indeed, plaintiffs state in their brief that if their motion to dismiss defendant's appeal is allowed they wish to dismiss their cross-appeal. In view of our holding that the amount allowed for damages is sufficient, it will not be necessary for us to consider plaintiffs' contention that the defendant is liable for damages sustained beyond the sum of \$500.

Plaintiffs have filed a motion to dismiss defendant's appeal upon the ground that it has not been perfected in accordance with the provisions of the Civil Practice act and the rules of practice of this court. The point made is that defendant did not file its praccipe for record within the time allowed by the rules. This court has heretofore refused to sustain like contentions. The motion of plaintiffs to dismiss the appeal is denied.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend J., concur.

And the control of th

If it postate comes said that with map so not paid, and the distribution of shows so it is a second of the said of

อมี ทุงในการเลือด โดย โดย เกาะเลือด การเลือด และ เมื่อ เป็น เมื่อ เมื่อ เมื่อ เมื่อ

.homrailtr

Company of the last of the las

39194

PEOPLE OF THE STATE OF ILLINOIS ex rel. JOHN JACOBSON et al., Petitioners.

T.

THE CITY OF CHICAGO, a municipal corporation, et al., Defendants.

EDWARD J. DOYLE et al., (Petitioners) Appellants.

THOMAS F. REILLY and JOHAN
WAAGE,
(Attorneys' Lien Claimants)
Appellees.

1

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

289 1.A. 622

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted from an order entered July 6, 1936, denying the petition of Edward J. Doyle et al., appellants, to vacate and set aside an order entered June 2, 1936, directing the defendants to pay to attorneys Thomas F. Reilly and Johan Waage, appellees, certain moneys as fees under a claim for attorneys' liem.

On September 21, 1934, a petition for mandamus, on the relation of 186 petitioners named therein, was filed against City of Chicago, Edward J. Kelly, mayor; Arthur Seyferlich, commissioner of fire; Pobert B. Upham, comptroller; and James A. Kearns, treasurer, to compel the payment to petitioners of fourteen days' pay that had been deducted from their salaries in 1931. Appellees, Thomas F. Reilly and Johan Waage, were the attorneys representing the petition.

Summons was issued and returned and there was filed, on behalf of all

Joke Tell (T. M.) U. Transcate on rol. John Labelled et al., Poblition and

57

TIT! UKTE OF CHECKED, a mankekenk

TD-ATO J. HOThe et ales (retitioners) Appellente.

(.it owneyst Them Theirmite)

AND THE REPORT OF THE PARTIES OF THE PARTIES OF THE PROPERTY OF THE PROPERTY OF THE PARTIES OF T

TIME COLD OF THE

This appeal is proneouted from an order entered July 6, 1986, denying the printers of Taurand . Deple entered July 6, 1986, denying the printer of the anterest and the content and the content of the co

On September 111, 1934, a position for numbers, in the relation of 186 petitionar named throught, was distributed this a substance of the confidence of the

Selling and Johns Sange, were the apparatus proposed in 1911 Inc.

the or the second secon

the defendants, a general and special demarrer to the petition.

On May 11, 1936, by leave of court, an amendment to the petition
was filed, which added 341 petitioners to the petition. The
general and special demarrer to the petition was ordered to stand
as a general and special demarrer to the petition as amended. In
that state of the record the said attorneys, apparently without
notice to the petitioners, filed, on May 27, 1936, a petition in
the said cause which, omitting the verification, is as follows:

"Thomas F. Reilly and Johan Waage, Petitioners, respectfully represent that they are duly licensed attorneys at law of the State of Illinois; that as such attorneys they duly undertook employment by all of the Plaintiffs in the above entitled cause, for recovery of fourteen days pay deducted from the salaries of the said Plaintiffs, for and during the year 1931, and then and there agreed to a compensation for their services in that behalf, of a sum equal to ten (10%) per cent of the amount recovered for, due or paid to each such Plaintiff, following such employment.

"Petitioners further represent that they have duly served a Notice of an attorney's lien under the said employment upon the City of Chicago, a Municipal Corporation, and Edward J. Kelly, mayor of the said City of Chicago.

"Petitioners therefore pray that an Order be entered fixing and allowing them the sum equal to the ten (10%) per cent of the monies to be paid each of said Plaintiffs for the fourteen (14) day deduction made from each of said Plaintiffs during the year 1931 and that the proper officials of the City of Chicago be instructed to deduct such ten (10%) per cent from the amounts so due and payable to each of said Plaintiffs and pay the same direct to said attorneys.

"Thomas F. Reilly "Johan Waage."

On June 2, 1936, the same attorneys filed the following:

"To: City of Chicago, a Municipal Corporation Edward J. Kelly, Mayor of the City of Chicago,

"Please take notice that the undersigned, attorneys at law of the State of Illinois, have been retained and employed by the persons, or their representatives, whose names are listed below; retired members of the Fire Department of the City of Chicago; to demand, prosecute and collect from the City of Chicago, a municipal Corporation, their respective claims, demands and causes of action of such persons, against the said City of Chicago, for the fourteen (14) days deduction withheld from their respective salaries for the year 1931 and that each of such persons have agreed to pay the undersigned as a fee for their services in that behalf, a sum equal to ten (10) per cent of the respective sums of money recovered for or to be paid such persons by reason of the deductions aforesaid.

the defendants, a range of reposing a read ward thing of them.

In lay 11, 1936, by lower of control to a main to discussion was filled the stated and the filled them. The same of the stated and the st

e buyunu qiba omaligodi tand dusabugan qoshtosil qeshiddil shi samu dusagoliqa shina esii qobuu maki u'yoshodda **qo toreshidi** qoshid o, rigada ta qo qo qoqoga haqir kushi a qorabidi **bo qiki**l qorabila bisa sali ke seysa

epixil: To recome of a day on tout you onclaimed anemátital."

not to an energ (191) mat est at lawy mus est endit princein but

191) postant est tot This met. I bire to done time est est est endem

1911 and postant est tot This mile to done to done time est est endem

1912 and one prince all this is to done to done to done to do done to do done

1914 and one of this to at the continuous est to done

1915 and one of the continuous est to done to done

1915 and the continuous est and any or the continuous est to do do est to do do est to do

## 111

On June 2, 1986, the sume observey. Cliffy but folkenin :

"To: Cliv of Chica, o, a hundalest tempor than Moward F. Kelly, M. you on the oliny of white o,

"Alene tair notice the united the unour fetted, the catego of the other of Illinois, leve been retain; one exallered by the persons, or their representatives, whose measurement of the fiber of the first twent of the fiber of t

"You are further notified that the undersigned claim a lien under 'an act creating attorneys lien and for the enforcement of same.' (In force July 1, 1909, Statutes of Illinois) equal to ten per cent (10%) of the respective sums of money due, cwing or to be paid the persons so named and listed respectively, by reason of the deduction or withholding of fourteen (14) days pay from said persons, during the year 1931 as aforesaid.

"The names of the persons represented by the undersigned against whom this attorney's lien is claimed are hereby listed as follows:

(All the parties on whose behalf the writ of mandamus is sought are here named.)

"Please govern yourselves accordingly.

"Dated May 8, 1936.

"Respectfully submitted,

"Thomas F. Reilly,
"Johan Waage,
"Atto rneys for the above named
Plaintiffs and persons."

On the same date they filed the following:

"To: The City of Chicago, a Municipal Corporation and Barnet Hodes, Corporation Counsel

"Please take Notice that we have duly filed our Petition in the above entitled cause for a judicial determination under notice, of attorney's lien, heretofore served upon the City of Chicago and that on Tuesday June 2, 1936, at the epening of Court, we shall appear before Hon. Judge Harry Fisher, and ask the Court to enter an Order in said cause in accordance with the prayer of said Petition, at which time and place you are invited to be present.

"Thomas F. Reilly, "Johan Waage"

On the same date the following was filed in the cause:

"ANSWER TO PETITION FOR FIXING ATTORNEYS! FEES UNDER ATTORNEYS! LIEN NOTICE.

each of them by John Barrett, their duly authorized agent and for answer unto the petition of Thomas F. Reilly and Johan Waage, attorneys for Plaintiffs in the above entitled cause, for determination of their fees as attorneys under lien notice, say:

"That said Plaintiffs admit the matters and things set forth and contained in said Patition and admit that said Plaintiffs and each of them agreed to pay said attorneys a sum equal to ten (10%) per cent upon the amount due them for deductions made from their respective salaries in the year 1931.

"All Petitioners named as Plaintiffs in the above entitled cause,

"[mg ama in the noting and the second and anthous about an all the second and an all the conference of an all the conference of an all the conference of a most (an all the all the second and an all the all the second and an all the all the second and all the all

North is the one of antinose union introduce and to appear a 2006 and the given to the state of a life of payment a skill moth tendings

of wind-frame in this order block based on action and the following in the following t

-0.001 75 var belik!"

CALL TO BEET TEN

bemon evode all not empre outer "autourg lar allivable."

t the gume dite they thiked the dekapethings

"To: The disp ed Nike o, a hundalpok seperation.

Leanust indicated to a south frank a

meiting and golf - Lot erast at tall golf golf on all one all golf on the golf of the section of the golf of the g

endiki. •"I kasaca"

the the same days the forth were read that the property

THE TOTAL STREET, WE DESCRIBE THE DESCRIPTION OF THE PARTY OF THE PART

one came to the covers the think this the second of the could be seen and the could be seen the formal to some the second the could be seen to the could be

"All Potitioners meats to Taintiffs in the show thilled outer "By John E. Barrett
"Their duly authorized agent."

The verification to the answer, made by Barrett, States, "that he is the duly authorized agent of the Petiltioners in the above entitled cause; that he has subscribed the foregoing Answer on behalf of said Petiltioners as their duly authorized agent." In the same date the following order was entered:

"Upon the petition of Thomas F. Beilly and Johan mage, attorneys at law, for determination and adjudication of fees of said attorneys for services under attorneys' Lien Notice which has been heretofore served upon the Defendants and now exhibited to the Court and filed herewith and upon due Notice to said Defendants through Barnet Hodes, Corporation Counsel of the City of Chicago, attorney for said Defendants, and upon testimony and evidence produced and heard in open court in support of the said Petition and the Ceurt being fully advised in the premises:

"It is Ordered By The Court that the compensation and fee for services of said Thomas F. Reilly and John Taage, rendered plaintiffs in the above entitled cause under the terms of the employment agreement between the said attorneys and said Plaintiffs; be and the same is hereby fixed and determined at a sum equal to ten (10%) per cent upon amounts due and payable by the City of Chicago, a Municipal Corpor tion, Defendant, to each of said Plaintiffs, by reason of the deductions of fourteen (14) days pay made and withheld from their salarles during the year 1931.

"It Is Further Ordered that the City of Chicago, a Municipal Corporation, and their duly authorized officials be, and they are hereby authorized and directed to deduct said sum of money as equals ten (10%) per cent upon the amounts due and payable to each of said rlaintiffs, from the amounts due them for the deductions storestid, and pay the same in equal shares to said Thomas F. Reilly and Johan Waage respectively, in full, for their services in that behalf, and pay the balance thereof to each of said Plaintiffs."

After due notice had been served upon Attorneys Reilly and Waage the following petition was filed, on July 2, 1936:

"Your petitioners, Edward J. Doyle and Allen V. Prunty, respectfully represent unto this honorable court that they are retired City Firemen and are named as plaintiffs in the above entitled cause.

Follow the names of all the other appellants) named as plaintiffs in the mandamus patition heretofore filed in the above entitled cause, that on the 2nd day of June, A. T. 1936, this honorable court entered an order directing the said defendants, City of Chicago, a Municipal Corporation, Edward J. Kelly, Mayor of the City of Chicago, and their duly appainted officials to deduct the sum of money as equals ten per cent (10%) upon the amounts due and payable to each of said Jaintiffs from the amounts so due them by reason of the deduction of fourteen (14) days pay made and withheld by the City of Chicago from their salary or salaries for the year 1931, and pay same in equal shares to said Thomas F.

The verifies at a time that the time of the product of the two shows of the two shows of the two shows of the two shows of the cause, the two should be the formation of the two should of the cause the total color of the relations of the cause the cause of the relation of the cause of the relationship order who interpretate the relationship.

"Upon the profition of Thomas is Neilly and Johns anger of notorneys at law, for determination and safet leaders of the contravers at law, for determination of the contravers of the contravers of the contravers of the law of the la

cur den mais emergen out truit truct ally beauton al to section and the perfere of the perfere out truct of the perfere out truct out the perfer of the perfect of the perfect

Inticions a competit of a fill and a competitive for the constraint of the constrain

thes has willed mornett many beyond used had solden one weth

the fellowing selision wer filed, on July 2, 1886)

to. This told there electronic back of the treatest this told the treatest this told the treatest this told the treatest this till the treatest this till the treatest this till the treatest treatest this till the treatest treate

 Reilly and John Laage, attorneys, respectively in full for their services in that behalf and pay the balance thereof to each of said plaintiffs.

employment exists or existed between the said attorneys, Thomas I. Reilly and John Jange, and the above named plaintiffs, and that there is no agreement or was there ever any agreement entered into by the parties hereto and the said attorneys whereby there is fixed and determined that a sum equal to ten per a nt (104) upon amounts due and payable by the dity of Chicago, a Municipal Corporation, defendant herein, to each of said plaintiffs by reason of the deductions of feurteen (14) days pay made and withheld by said City of Chicago, a Municipal Corporation, irom their salary or salaries during the year 1931.

"Your petitioners therefore pray that the order heretofore entered on the said and day of June, A. D. 1936, be vacated and set saids and that the notice of attorneys' lien heretofore filed with the City of Chicago, a lunicipal Corporation, by the said Thomas F. Reilly and John laage, attorneys in said management petition, be declared null and void and of no effect, and that the shock for said 1931 salary or salaries, belonging to said petitioners be released by the said Comptroller of the said City of Chicago, a Municipal Corporation, to the petitioners herein.

"Allen V. Prunty,
"Edward J. Doyle,
Petitioners."

The verification to the potition is made by Prunty and Doyle. On July 6, 1936, council for home: J. Reilly and Johan assessarved notice upon counsel for appellants that on londay, July 6, 1936, he would file the answer of heilly and leage to a cellants' petition and would at the arms time ask that an order be entered denying the prayer of the petition. On that date the following answer was filed:

\*Now come Thomas F. Reilly and Johan Waage, Respondents, and for answer to the Petition of Laward J. Doyle and Allen V. Frunty, filed in the above cause on July 2, 1936, they and each of them say:

"1. Amit that the said Petitioners and (here are named all the other appellants) are named as Plaintiffs in the Handamus Petition filed in the above entitled cause and further admit that on June 2, 1936, an Order was ontered herein, directing the Defendants, the City of Chicago, a Municipal Corporation, and Edward J. Kelly, Mayor of the City of Chicago and their duly authorized agents and officials, to deduct the sum of money equal to ten (10%) per cent upon the amounts due and payable to each of the Plaintiffs in the above entitled cause, by reason of a deduction of fourteen (14) days pay withheld by the City of Chicago, from the respective salaries of the Fatitumers in the above cause, for the year 1931 and that the said ten (10%) per cent be paid in equal shapes to those respondents for their services in behalf of the Plaintiffs in the above entitled cause.

no de la level est vésse en la competencia que embre deste la forma que la les la como de la distribución de la competencia de la laboración de la laboración de la laboración de la laboración

"Your is ended in the control of the

"Your peaking on the end of the end of the back of the back of the end of the

The verifies the control of the cont

"Now deem Transport II. Willes et al. Willes despessed of the second of

The state of the s

was the attorneys of record for the Plaintiffs in the above entitled cause; that the sold cause is a Mandanus Proceeding, filed by the Plaintiffs on their behalf and on the behalf of all others similarly situated and in a representative proceeding; that the Petitioners Edward J. Doyle and Allen V. Prunty and (here are named all the other appellants) on whose behalf they filed their said Petition to vacate the order of June J. 1936, as aforesaid will receive the benefit of the said proceeding and receive from the City of Chicago in accordance with the Juagment of this Court the Lourteen (14) days pay unlewfully rithheld by the City of Chicago for salaries during the year 1931; that the deduction of ten (10) per cent due these respondents as attorney's fees, constitutes a part of the expense of the trial of the above cause and as such, should be borne by the letitioners dward J. Boyle and Allen V. Frunty and those persons on whose behalf they filed their Petition herein on July 2, 1936.

\*3. Further answering these Respondents aver that the said Petitioners Edward J. Loyle and Allen V. Frunty and those an wasse behalf they filled their said last mentioned satisfies to receive the benefit and advantage of the judgment in Handemus of this Honorable Court and by virtue of the said benefits, they and each of them should in equity and in law, pay their respective pro-rata share of the expenses of the said suit.

"Having fully answered the said Petitien, these Respondents and each of them ask that the prayer thereof be demied.

"Thomas F. Reilly
"Thomas F. Reilly
"Johan Waage
By Thomas F. Reilly
"His duly authorized agent,
Respondents.

"Gregory Gelderman, Attorney for Respondents."

(Here follows the verification.) On the same date the trial

court entered the following order:

"This matter coming on to be heard upon the petition of Edward J. Doyle and Allen V. Prunty heretofore filed herein on July 2, 1936, and the verified answer of Thomas F. cilly and Johan Waage, respondents thereto and the court having read and considered the said petition and answer and having heard counsel in support thereof.

"Doth Find that Thomas F. Reilly and Johan Leage are the attorneys of record for the plaintiffs in the above entitled cause; that the said cause is a mandemus action filed by the plaintiffs on their behalf and on behalf of all other persons similarly situated, to recover from the Sity of Chicago fourteen (14) days pay or salary unlanfully withheld by the City of Chicago during the year 1931; that the petitioners idward J. Dovle and Allen V. Frunty and those persons named in their said petition and on whose pehalf they filed the same, will receive the benefit and proceeds of the judgment entered in the above cause; that the sum of money equal to ten (10%) for cent upon the amounts due and payable to each of the

The control of the co

"8. Survive to the control of the co

on end of the model of the control o

- LEbest VIII - 1995 W - South Res OW - 1997 W L

"(regery Geleranum; ) thousanter,"

(Act of a collection of a coll

court entered the fellenthe orders

នៅលើ បាន សុក្សា នេះ នេះ ១៩៦ ម៉ែន ក្រុមី ដែលមិន «គឺ ប្រទេសម៉ៅ ប៉ាន់ទៅថា ប៉ាន់ទើប និះ ប៉ាមី ប្រែចំប្រើបាន «សុសម៉ា បាន ប៉ាន់ បានប្រែបាន «សុសម៉ា បាន «សុសម៉ា បានប្រែបាន »សុសម៉ា បានប្រែបាន «សុសម៉ា បានប្រែបាន «សុសម៉ា បានប្រែបាន «សុសម៉ា បានប្រែបាន «សុសម៉ា បានប្រែបាន «សុសម៉ា បានប្រែបាន «សុសម៉ា បានប្រុំ «សុសម៉ា បានប្រែបាន «សុសម៉ា បានប្រេបាន «សុសម៉ា បានប្រេបាន «សុសម៉ា បានប្រែបាន «សុសម៉ា បានប្រេបាន «សុសម៉ា បានប្រែបាន «សុសម៉ា បានប្រេបាន «សុសម៉ា បានប្រាជ្ញា «សុសម៉ា បានប្រេបាន «សុសម៉ា បានប្រេប» «សុសម៉ា

plaintiffs and which has been ordered to be paid to the said respondents Johan Mange and Thomas F. heilly in equal shares and as attorneys' fees for services renered to the plaintiffs in the said cause, is fair, reasonable and just and that the said sum of money is and constitutes a part of the expense of pronecuting the above cause and the said patitioners duard J. Doyle and Allen V. Frunty and those persons named in their said patition have had the use and benefit of the services rendered by the respondents.

"Wherefore in consideration of the foregoing it is present that the prayer of the petition filed herein by Edward J. Moyle and Allen V. Frunty on their behalf and on behalf of the parties named in the said petition to vacate the order heretofore entered in this cause on June 2, 1936, be and the same is hereby denied."

This appeal is prosecuted to obtain a reversal of that order.

Appellants contend: (1) "In view of the admission in the pleadings [the answer of Reilly and waage to the petition of appellants] that there was no contract of employment between the claimant attorneys and the appellants it was error for the trial court to enter its order of July 6, 1936, denying the petition to vacate and set aside its order of June 2, 1936, allowing the lien for attorneys' fees. (2) Even if the trial court could regard the averments in the notice and petition for attorneys' lien as conicle of the sworn allegations of the petition to vacate and set aside the order of June 2, 1936, allowing the lien for fees, there was then an issue of fact upon which the court should have heard evidence instead of proceeding summarily to enter the order of July 6, 1936, denying the prayer of the petition."

In their notice of attorneys' lien, Attorneys Reilly and Waage base their claim upon an express contract of retainer and employment, as appears from the following language in the notice: "\* \*

Each of such persons have agreed to pay the undersigned as a fee for their services in that behalf, a sum equal to ten (10) per cent of the respective sums of money recovered for or to be paid such persons by reason of the deductions aforesaid." The petition for lien filed by the attorneys sets up an express contract of retainer and employment.

Din estativit setta en notatione setta en estatione est averente (100 den 2010) den 2010 en en estatione e

and the state of t

Appealments a standard (1) that we are sets as a standard the standard

The part of the entry of the thirty and the control of the continues and product of the part of the control of the control of the part of the control of the

the sale of the sa

while in the intelligation of the following in the politic for the first section of the section of the first of the first

The answer of "All Petitioners named as licintiffs in the above entitled cause," filed by John ". Barrett, "Their duly authorized agent," to that petition acmits "that said Plaintiffs and each of them agreed to pay said attorneys a sun qual to ten (10%) per cent upon the amount due them for deductions made from their respective salaries in the year 1931." The order of the trial court fixing the lien is based upon an express contract of employment. The petition of the appellants to vacate the order of June ?, 1936, alleges, under oath, "that no contract of employment exists or existed between the said attorneys, Thomas I. Weilly and John cage, and the above named plaintiffs, and that there is no agreement or was there ever any agreement entered into by the parties hereto and the said attorneys whereby there is fixed and determined that a sum equal to ten per cent (10%) upon amounts due and payable by the City of Chicago, a Municipal Corporation, defendant herein, to each of said plaintiffs by reason of the deductions of fourteen (14) days pay, " etc. The answer of the attorneys to this petition abandons the position that there was a contract of employment between the parties, and seeks to sustain the judgment fixing the lien upon the theory that the mandamus proceeding was "a representative proceeding," that the petitioners, including appellants, "will receive the benefit of the said proceeding," that the ten per cent provided in the order "constitutes a part of the expense of the trial of the above cause and as such, should be borne by" the petitioners. The order entered by the trial court on July 6, 1936, in based entirely upon the new throny advenced in the answer of the attorneys. No evidence was heard, and the order recites that the finding of the court is based upon the petition of appellants and the answer of the attorneys.

The attorneys' lien law, as amended in 1927, provides:
"That attorneys at law shall have a lien upon all claims,

what will also with it is not to a more of their like the country selft. 5 . Institute (Dr. 1 in the promote Call Indone) the Edit Section of Gallesians. in the contract of a line of the contract of the contract of . Delita treme dell'er dio estre septembre e a 1904 et et et en de la 1904. merbå CL 😘 och Station grad Aerakun ich wiede bilden and Station Grad Station in 🖟 Charles william to the interest of the property of the december of the control of the con volume to the control of the control of the control of the control of There made plicinglish a true as so he had a so to be not not one of the contra and or for their things of the Bending to the first Union 12 the entity of their systems per comb (LD) man a morat of a car gage has by the cherce of the car a comisional former tirus, est us been ins to the tirus to the contract for individu off of the definition of the design of the care of the care of the care of tre the cult field the side of room and it can plant ther but of the high and entració ha de la compania del compania de la compania del compania de la compania del la compania de la compania del la compania de la compania del la - ver gode, odd to sitring off sylopes Alia" (afmillegar mulhulemi ្រែ ស្រុក ស្រុក នៃដែលប្រជាពលរបស់ ស្រុក nd Albair form a for a line, quality as to India - ft to selecte eat to borns have the modified one of the and a state of the city action on All in the entire open in the first of the first of the policy of the po entrace of the electric on the electric decided on the electric of the electric on the electric of the electri in an A. Down and a copy over fould once of the Committee of the death and the

The observance of like a law should be a like in the state of the stat

demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or cellection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee, for the services of such attorneys rendered or to be rendered for their clients on account of such suits, claims, demands or causes of action.

(The above provision follows verbatim the act of 1909.) Supreme court has held that an attorney's lien under the not must be based upon a contract, either express or implied, for fees, entered into by client and attorney. (See Moople v. Hollen, 304 Til. 394.) The placing of a claim, demand or oruse of action in the hands of an attorney for suit or collection constitutes a contract of employment between the client and the attorney, and in such a case, even though there be no express agreement for the payment of foes, an agreement to pay reconable fees is implied. an attorney may prove his lien by circt or circumstantial evidence. but if there is no employment of the attorney by the alleged client there can be, under the act, no lien for feet. It would be idle to argue that the attorneys in the instant proceeding are entitled to a lien upon the theory of fact advanced in their answer. The contention that this is a representative proceeding is clearly an afterthought, as neither the petition for mandamus nor the amendment thereto purports to be in behalf of any person not named thordin.

with notice that the attorneys would and for a order fixing their lien. The answer of the attorneys to appellents' petition concodes, in effect, that they were not employed by appellents but that the lien order should be sustained on equitable counds "by virtue of the said benefits they and each of them" are to receive if a judgment for mandamus is entered in the cause. Intuities and in the equitable reasons that prompted the trial court to deny the prayer of appellants'

"samilion ho abume

deserbation of amount at the first the second of the secon

The first to the terms of the feet of the first of the first of the content of the first of the first

The people of the state of the

petition, the effect of the ruling is to leave in rull force the order fixing the attorneys! lien. As we have heretofore stated. if there is no employment there can be no lien. Because of the nature of the answer to appellants' petition, the order fixing the lien should have been vacated. Twen if it were possible to interpret the answer of the attorneys as a denial of the allegations of appellants' petition that there was no contract of apployment, it would follow that there was a material issue of fact to be tried. But it seems reasonably clear from the course pursued that the able attorneys sought to avoid a trial of that issue. They seek to sustain the order in question upon the ground that the record fails to show that appellants offeredamy evidence to sustain their petition. It is a sufficient 'newer to this argument to say that because of the nature of the attorneys' answer to appellants' petition no proof was necessary. Indeed, the record shows that the attorneys desired that the action by esterminic upon the petition and answer.

The order of the Circuit court of Cook county of July 6, 1936, is reversed, and the cause is remanded with directions to the trial court to vacate the judgment order of June 2, 1936, fixing the atto neys' lien, and for further proceedings not inconsistent with this opinion.

we do not wish to be understood as holding that the attorneys may not assert their right to a lien. If they do so assert, a proper issue can be made up and the question determined by the trial court upon evidence submitted to him.

ONDER OF JULY 6, 1936, REVERSED AND CAUSE REMANDED SITH FIRSTIONS TO VAC TO JUDGE OF OUR OF JUNE 2, 1136, FI LIC AF U.A YOU LIE, AND YOU BUTHER PROCESSINGS NOT INCONSISTENT WITH THIS OPINION.

Sullivan, P. J., and Friend, J., concur.

prishing the control of the control

The one of the Linguistic court of the court of the court of the court of the configure, and the compensates, the court of the court of

e de destructions de la companya de

TWO CONTROL OF THE CO

samono seg spreage, pm. ceg . smaketta

39205

SAMUEL J. CLAPHAM, Plaintiff,

V.

ABRAHAM KAPES et al., Defendants.

STATE LIFE INSURANCE COMPANY, a corporation, (Intervenor) Appellant.

HEITMAN TRUST CO., a corporation, Receiver, Appellee. 58

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

289 I.A. 6231

MR. JUSTICE SCAMLAN DULLY TO THE OPINION OF THE COURT.

Appellant, intervenor in a foreclosure proceeding involving subordinated bonds, appeals from an order granting the successor receiver, Heitman Trust Company, a first and prior lien against the premises in the sum of \$771.03 and ordering that a receiver's issue. certificate in that amount appellant is the owner of the premises by virtue of a master's deed, dated February 29, 1936, issued in another foreclosure proceeding brought by it, on December 29, 1933, in which were involved prior bonds on the premises.

Samuel J. Clapham, plaintiff in the proceeding involving the subordinated bonds, filed his bill to partially foreclose, on February 23, 1931. Appellant was not made a party to that proceeding. A decree of sale was entered in that proceeding and the premises were sold to Clapham for \$500. Because of a deficiency decree the receivership was continued during the period of redemption. On June 24, 1932, Division State Bank was removed as receiver and

39005

e Liditide II

15

eastringth.

The state of the world to the state of the s

- sublicado - sublicado (\* 100 liberio)

interesting the state of the content of a content of the state of the

edrandi 1. Olegares di Tabonica, pininger di compositi de de sance di compositi de di compositi della composit

As destroy of ante were continued in what you and into the start of the provided of a colining the provided of a colining the coston of the coston of

it was ordered to file a final account and report within thirty days. It did file the account, which showed that the property was being operated at a deficit. The account was approved. Haltman Trust Company, a corporation, appellee, was appointed successor recoiver of the premises. On april 29, 1936, the attorneys for appellant served notice on the several counsel in the fereclosure proceeding that they would "present the Petition, a copy of which is herewith served upon you, and shall ask a rule on you to answer same within five days." On the same date an order was entered granting appellant leave to file the petition, and the receiver and other parties to the suit were ordered to answer the same within ten days. The petition alleges, inter alia, that appellant is the owner of the premises in question by virtue of a master's deed duly recorded; that Heitman Trust Company, receiver, is still in possession of the premises; that the last order entered in the cause was on March 3, 1936, approving the receiver's report and account and continuing the matter of the allowance of fees until the termination of the receivership; that the petitioner has, at various times, demanded possession of the premises from the receiver but that it has refused and still refuses to deliver pessession to petitioner. The petition prays that petitioner be granted leave "to enter its special appearance solely to file this petition for the purpose of having an order entered in this cause commanding said receiver, Heitman Trust Company, to deliver up possession of the premises. " On the same date an appearance was filed for appellant "solely for the purpose of filing its intervening petition." The verified answer of the receiver states that while acting as such receiver it made certain expenditures and repairs to the building, which were reasonable and necessary, and that it duly advised appellant of said expenditures, as will more fully be seen from the

As an otherwise of the control of the second of the second

The light of the feeth of the second of the second of the second of the second of stability, not no effort a fire field or error lego to the efficient of fragsk ower stilling outen granting, argulating above to this other particles and any - the discrete recent the protection of the discrete filter and the discrete filter. the longer and the said of the control of the agree of this in nimada an a an amin'ny fivoitrana ao amin'ny ben'i Norman ani anahan'ny taona ao ao ao amin'ny faritr'i Augustaina. dead dealer recommend to the terminal Manual deaments, as entreve, is notified with the forestan median to a feeth of the greathering and to melamorating at cause has an itemated, it is a company of the service of the state of the service Aight mad and on the constant of the contract of the the contract of the contr ar , mai ta india de la companya tangga (Mara Maina de la mai de la companya de la mai de la companya various times, dum on de remonsulan as who promises from the contra of the Land story towished our country deficit but benefit a and the tout that postsioner, of action pany this year notice of a memorial to - Mo to i national since of the occupanto elements of Anicego with rothe sing pullantage came will his borner ashroun, mixed to and to make weed our synthetro. 'Afternation and member 'say post desilente vol Coll. . . . or wonger no eleb er . ell mi fapo herre and " smithing min. which is in the in the same of the land of the

ford as quite while that estate that on one to the remain to the relative of the remain that the countries of the second interest of the countries of the remain that the remain the remain that the remain the r

And a core representation of the time that it will available

the second section of the property of the second section in the second section is a second section of the second section of the second section is a second section of the sectio

petition filed by the receiver on December 19, 1934, which the receiver by reference incorporates as part of the answer; that appellant is complainant in a case entitled State Life Insurance Company, a corporation, vs. ..braham Kapes et al., in the Circuit court, wherein a bill was filed to foreclose a first mortgage trust deed on the premises in question; that it, Heitman Trust Company, receiver, acting for and on behalf of the court, incurred various debts and obligations in keeping, maintaining and managing the property, and that it advised all of the parties to the proceedings. including appellant, that the premises were operating at a deficit: that various inquiries were addressed to appellant by the receiver informing it as to the deficiency, etc.; that there is a deficit in the receivership account of the sum of 1738. The receiver prays that an order may be entered that a receivership certificate shall issue on the property which shall constitute a first and prior lien to any and all incumbrances and liens now existing on the premises in the amount of the deficit. On May 11, 1936, the trial court, at the instance of the attorneys for appellant, entered the following order:

"On motion of St. George and Davis solicitor for State Life Insurance Company, a corporation, and this cause coming on to be heard upon the motion to discharge the Heitman Trust Company, a corporation, as Receiver, and it appearing to the Court that a Master's Deed to the premises has been issued to the State Life Insurance Company, a corporation, and the Court being fully advised in the premises,

"It Is Hereby Ordered that the said Weitman Trust Company, a corporation, as Receiver, be and it is hereby discharged as such Receiver, and that the said Receiver turn over possession of the premises to the State Life Insurance Company, a corporation.

"It Is Further Ordered that the Neceiver file his final account within ten days from the date hereof and that the hearing as to the unpaid operating expenses and for the deficiency incurred by the said Receiver and the liability of the parties for the said expenses and deficiency, be and the same is hereby set for hearing on June 1st, 1936, without further notice."

On June 1, 1936, upon motion of the attorneys for appellant, the hearing set for that date was continued until June 18, 1936.

reform the end of an interest of the relation of the self-interest of th (1) In the second of the se a described for the end of the company of the end of the county thereon a bill way will do no forcell and this amore the country deed on the profile to be no class since its and the company weekyes, soting for and on baleta of but course, indicated villing grank, a ser the or said and but to the sentimes of and then extreme an the light to the state of the description of the light contraction of the light contraction. the few restrated to the court of the second of the continuous states at in the control of the med weber the double medical, me black deline garagory and no emeal we find the this the son and his bus abstract fis bus yes of the amount of the definite, the same like it to be I a omety and to whome the class to be appropriate and the sendant and the

## \*PELLINGS | STILLING

"in motion of Mt. dorner call that for the call that for the call the Insurance dominary, a compactive, and thin call that can call the call that the call t

"It Is Heraby Collared that the ende inches of the blanch Ingelegy, a comporation, on It endered the end it is hereafter five the collection of the blanch of the blanch of the collection of th

"It is intribute Crieves sinch sinch and west line line in a line a line in a line in

or now 1, 1936, upon motion of the attorneys for gall at, in-

The hearing was formally continued from time to time until on July 15, 1936, the matter came on for hearing before the trial court. No objection was made as to any of the continuances.

Appellant was represented at the hearing by Attorney Lavis. Prior to the hearing the report of the mostiver had been filed and approved. The following is a full transcript of the proceedings:

"Mr. Davis: If the Court please, on this Claphem v. Kapes case your Honor instructed us to get the itemized permanent improvements.

"The Court: Go and put them on the stand.

"Mr. Davis: Now he is here and he actually expended this money.

"The Court: I want to know what the improvements were.

"Mr. Hershenson (attorney for receiver): The reports have been files already; the Receiver's report showing the expanditures and improvements has been filed, so that is not an issue.

"Mr. Davis: It is just a question of your ruling on whether certain improvements are permanent or not such as window shades and curtain rods and carpeting and janitor's supplies.

"The Court: Gas stoves, refrigerators and that carpenter work.

"Mr. Hershenson: If you included the refrigerators and the gas stoves and carpenter work it will run well over the \$666.51 that we claim. The refrigerators were \$401.25, the gas stoves were \$84.00 and the carpenter work ran semewheres around between eighty and ninety dellars. Then there was some boiler work and plumbing which would bring it up 'way over our total but what we classed as permanent improvements did not include the refrigerators.

"Mr. Davis: They are separate boxes.

"The Court: The Court finds that the Receiver, in order to keep the property in tenantable condition, was obliged to make improvements as follows: He paid \$666.51 for heating boiler, for new window frames and purch --

"Mr. Hershenson: For porch repairs and roof repairs.

"The Court: -- For new porches and roof; he was also coliged to expend \*84.00 for gas stoves purchased for the kitchens; he was also obliged to pay, during his time, '401.25 for refrigerators in the right management of said property.

"Up to the time that he finally quit the receiver was in arrears or had a deficit of \$771.63; no, it was \$771.03. It is true that the first mortgage merely stood by while the receiver was keeping the property in tenantable condition; it is also true

7 / 17

in . We still a like the consideration of the consideration of the constant of

Olar icvist the fame for the street of the old plane we man and construction of the co

. Omnou ont inc. the time and of literate entite

aint on the generalization of our open of one of the salver att?" • youre

The Court is much to the control of the court of the court of the court of

Olly. Negaliance of ("Allorange of the charge of the charg

A STANDARD AND A STAN

The Courts and Corresposition of the analysis of the second and the

"Mr. Hir harma. II. pou lesiuded de dig dig de Son. N.
the per stoves as est patet actification de line over discourse the constant over discourse de line over discourse de line de line de la line de line d

Price Porrs. You Jaurs Timber and Timber and

THE PERSON NAMED IN

The state of the s

Vin to the time of a first first of a district the call the or a ly a ... and the care of the call of a first first of a called the called the

that the receiver continued to manage the property after the equity of redemption expired. There were irregularities but they were innocent.

"The first mortgage has received the benefit of these operations of the receiver; that in keeping the property in tenentable condition the receiver has waived any claim for fees and the lawyers for the receiver have waived their claim for fees and the Court thinks the equity of the case requires that the Court's receiver have a certificate for the sum of \$771.03, as a prior lien over and above the first mortgage in this cause; the said sum to be applied by the receiver for current bills amounting to \$771.03.

"Mr. Hershenson: All right, thank you.

"(Which was and is all the Evidence offered and other proceedings had on the hearing of the above entitled cause.)"

Appellant's notice of appeal states that it will ask this court to reverse the order entered, upon the ground that the lower court had no jurisdiction to enter it. In this court it contends: "2. That after the lower court on May 11, 1936, ordered the receiver to turn over the premises to intervenor, it lost all further jurisdiction as to intervenor and said premises, and cortainly, the lower court lost jurisdiction of intervenor and said premises 30 days after the entry of said order of May 11, 1936, and that on July 16, 1956, the court clearly had no jurisdiction of either of intervenor or said premises. 3. That the receiver upon the expiration of the period of redemption was a receiver de son tort. 4. That intervenor is not liable for any deficit created by the receiver." As to contention 2 it is sufficient to say that appellant is in no position to raise the point that the court had no jurisdiction of the person of appellant after the chiry of the order of May 11. It was upon its motion that the court ordered the receiver to file its final account within ten days, "and that the hearing as to the unpaid operating expenses and for the dericioney incurred by the said deceiver and the liability of the parties for the said expenses and seficiency, be and the same is hereby set for hearing on June 1st, 1956, without further notice.

n de la composition della comp

the following and the second of the second o

stong that had got the she she needed it . The

\*positional. Notice of equant of tent in it. The alse of court for any surfaces the audite takenod, as a via grown which which is not computated at the state the computational of the state of the stat

and denote only well throughout on her or neither, on the state on the state of the

and so the unpolitered and come or end on the line and the and the star the

In the herring before the trial court on July la speell nt not only did not raise any question of jurisdiction but practically invited the court to proceed with the hearing. The contention that the court, in any event, lost jurisdiction of appellant thirty days after the order of May 11, 1936, is also without merit, as the record shows that the hearing was formally continued, without objection, from time to time.

Appellant contends that "where the receiver operated the property at a loss and failed to advise the court that he so operated the property, he is personally liable." It is a sufficient answer to this contention to state that no such point was made or suggested before the trial court at the time of the hearing. Indeed, appellant's counsel stated that the receiver had actually expended the money and that "it is just a question of your ruling on whether certain improvements are permanent or not such as window shades and curtain rods and corpoting and junitor's supplies." Not a single objection was made by the counsel during the proceeding, not even when the trial court announced its judgment. Counsel for appellant stood silent while the court stated his reasons why the claim of the receiver was a just it is a resconable inference from the report of procedings that counsel for appellant, at the time of the hearing, acquiesced in the ruling of the triel court. The contentions raised appear to be the result of an afterthought.

clusion that all of the parties to the proceeding, including appellant, stood idly by, although they know the receiver was operating the promises at a deficit. Appellant filed its bill on December 29, 1933, and undoubtedly had knowledge of the situation. The receiver was handling the property at a time when it was very difficult to manage

The control of the co

Minimum of Allein to see his contribute to willion to make a contribute to willion to make a contribute of the first and the contribute to the contribute of the first and the contribute of the

THE RESIDENCE OF THE PROPERTY OF THE PROPERTY

apartment suildings without a loss. The record shows that the Division state Bank, receiver, operated the premises at a loss, and that the instant receiver desired all parties in interest to know the real situation. No charge has been made that it was dishenest or inefficient in its management. Under the record none of the parties to the proceedings has an equitable right to complain of the order in question.

The judgment of the Circuit court of Gock county is affirmed.

JUD CAPENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

egentenent subdiction. There was a series with a set of the description of the series of the description of the series of the content of the series of the content of the series of the

al marmon ille, to drive absorb size to driven but oft

Callivens T., sed Dien's V., Sandan

NEW ERA MOTORS, Inc., a Corporation, and A. M. ANDREWS,
(Complainants and Cross-Defendants) Appellants,

VS.

O. L. ASHTON, H. F. RUSSELL, doing business as Ashton & Russell, and LUCIEN I. YEOLANS, INC., a Corporation, (Defendants and Cross-Complainants) Appellees,

and

FOREMAN STATE NATIONAL BANK, a Corporation, (Cross Defendant) Appellee.

51

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

2 9 I.A. 629<sup>2</sup>

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainants from a decree entered February 24, 1936, which dismissed their amended bill for want of equity and by way of relief to Ashton and Russell, defendants and cross-complainants, gave judgment in their favor against Andrews for \$56,397.20 with interest from December 21, 1929, at the rate of 5% per annum.

began kay 11, 1919. The kew Bra motors is a corporation organized under the laws of Delaware, with offices in New York and Philadelphia. It was on kay 11, 1929, financing and promoting the manufacture and sale of a front wheel drive for automobiles, a novelty in sutomobile engineering, in which Andrews owned certain rights and licenses which he was under contract to assign to the motor company. Assign and dusgell were copyrings doing ausiness as manufacturing and contracting engineers in Chicago. Lucien I. Yeomans, Inc., was an Illinois corporation with offices in Chicago, where it was engaged in the profession of industrial engineering.

May 11, 1929, Andrews retained the Yeomans corporation as

the second of th

or and the second of the secon

grand to the section of the section

The state of the s

We charge this incompare incompared to the control of the control

For the jets, earlier factories from the control of the control of

as standard to the control of the co

to the state of th

his agent and supervisor in connection with work to be done and material to be furnished by Ashton & Russell under a written contract of the same date, by which they agreed to furnish 2000 sets of front wheel drives for automobiles, each set consisting of two assembled units substantially as shown on Weiss Engineering Corporation drawings 0-11, D-77 and 88, for \$30.64 per unit, boxed f. o. b. Chicago. The agreement between andrews and Asiton & Russell recited that the work was highly special in character; that there wasto be a tool expense of \$8500; that 1/3 of the total amount of the order of \$49,353.33 should be advanced, the balance to be paid by sight draft B/L attached as shipments were made.

May 13, 1929, Andrews furnished to Yeomans, Inc., and Ashton & Russell the drawings, specifications and date in connection with the manufacture of these front wheel drives, and Ashton & Russell proceeded to let sub-contracts for the manufacture of the various parts. The work was done under the supervision of Yeomans, Inc. As it progressed it was checked from time to time by the Weiss Engineering Company, Activity, Muller, Reichman, Roberts and Carvey, all of whom were employees representing either Andrews or the new Era Motors Company.

These men gave instructions and from time to time ordered changes in plans and specifications. Mr. Yeomans and mr. harvey made several trips to the East to confer with plaintiff's engineer there, and upon returning ordered changes. The evidence shows that the front wheel drive unit was a novel idea in sutomobile engineering, and that much of the proliminary work was experimental. Changes were from time to time made in the plans and specifications, - to what extent is in dispute - but it seems that the final set of productive prints was not furnished to manton a mussell until September 29, 1929. They thereafter proceeded to manufacture on a

Have a control of the control of the

the state of the s

Eventure at the single of the second contract of the second contract

The work in a compact of the real of the compact of

production basis and asked for shipping instructions and advancements of further sums of money as provided in the contract as they construed it. A few sets of drives were delivered, but Ashton & Russell were not able to obtain from Andrews orders for shipment or advancements of money as requested. It is apparent that plaintiff Andrews became financially emberrassed. Yeomans, Inc., acting for plaintiff, notified Ashton & Russell that unless they received orders to the contrary they should stop work December 16, 1929, and Yeomans, Inc., informed Andrews by telegram of this order without any practical results.

January 24, 1930, the New Era Motors, Inc., filed its bill in the Superior court, naming as defendants Ashton and Russell, copartners, and Lucien I. Yeomans, Inc. April 23, 1930, thereafter Andrews was by amendment made a co-plaintiff and an amended bill was filed. The amended bill set up verbatim the written agreements between Andrews and Ashton and Russell and Yeomans, Inc., of Kay 11. 1929. The bill averred that the agreement with Yeomans, Inc. provided that Yeomans would develop a source of supply for not exceeding 5000 sets of front wheel drives for automobiles substantially as shown on Weiss ingineering Corporation of "in, v-11 and "detailed drawings furnished by us"; that the agreement with Ashton and Russell provided that the copartnership was to furnish 2000 sets of front wheel drives, "each set consisting of 2 assembled units substantially as slown upon leiss Unlinearing Corporation drawings 0-11, D-77 and 38"; that the price was to be 30.64 per unit, boxed f. o. b. Chicago: that Andrews acted for and in benalf of the Motor company; that Eay 18, 1929, he paid \$1000 as retainer to Yeomens. Inc., and deposited on that date \$5000 with the Chicago Trust Company to be applied on cost of manufacture under the contract, subject to the check of Ashton and Russell, to be countersi hed by Lucien I. Yeomans or J. b. Hill; furnished all drawings and specifications

en in the finite of the state o

for a latisfy collist water collists with a well and a substitution of the collists of the collisis of the collists of the collisis of the col

and the second of the second o were great the control of the the same of the sa and the control of th the section of the se as shown on lains and the man which the highest the around as drowings far in the car; the control of the control of start lly as some some and at a terror of land a constant in the state of th I. c. i. Wales of a control of the c . W. W. W. I. M. W. W. W. World Birt on you ? I get you is at \$7 - 9 at e volument francisco e a la distributa de la morre isperii imi e e ali pany to be a sile of the committee of the second will a second . delpana en al alla desta la compania de la compania del compania de la compania de la compania del compania de la compania del la compania del la compania de la compania de la compania del la compania de la compania del la compania d

..... Pilot . . . Caranga lin bon i and ; Lin .. . To and took

necessary to the manufacture of the drives; that Russell and Ashton proceeded to place orders for the manufacture of the drives, and that in September, 1929, they delivered 34 sets of the same and manufactured 170 sets which they had not delivered and which they refused to deliver; that the units were insedictely needed in the manufacture of automobiles; that notwithstanding the \$50,000 deposited under joint control with Russell and ashton and Yeomans, defendants refused to deliver the goods, claiming additional sums of money to be due, and Yeomans, Inc., and Russell and Ashton had conspired to disburse illegith ately advancements made and to dissipate the funds; that Russell and Ashton are insolvent. The prayer of the amended bill was that a count might be taken, discovery made and defendants required to deliver unfurnished units and enjoined from disposing of the units to my persons other than the complainants.

Ashton and Russell and Yeomans, Inc., filed separate answers admitting the execution of the contracts on any lith, the advancement of the moneys. etc., but denying the conspiracy and denying the equity of the bill as amended. Yeomans, Inc., in its answer also averred that Andrews was indebted to it in the sum of 4000 which had not been paid. Russell and Ashton in their mower claimed a balance due from complainants to them amounting to \$99,865.35.

Thereafter Russell and Ashton filed a cross bill praying that Andrews be required to pay the amount claimed to be due to them. Yeomans, Inc., by amendment to its answer to the amended bill, set up that the issues as between it and complainants had been adjudicated in the State of New York in its favor, where on January 20, 1932, it obtained a judgment against Andrews for \$55444.54, with costs amounting to \$151.85. The complainants

- 0

necessary or as a law property of the property of the control of t

in the section of the continuous of the continuo

their antropy of regarders of the control of the control of the control of the control of their their antropy of the control of their actions, the control of their actions of their actions of their actions, the control of their actions of their actions, or say that are their actions of the control of the

answered each cross bill denying the material facts averred. The cause was put at issue and referred to a master who took the evidence and reported that the issues as between Andrews and defendant Yeomans, Inc., had been adjudicated by the judgment of the sugreme court of New York in favor of Yeomans, Inc.; that the equities were with the defendants and cross-complainants, and that there was a balance due to Russell and Ashton from Andrews amounting to \$56,397.20, for which judgment should be entured, upon payment of which complainants would be entitled to their material and tools.

Objections by complainants were overruled by the master and the case was heard before the chancellor on exceptions to the master's report. As already stated, the chancellor, by decree entered February 24, 1936, overruled the exceptions, approved the report of the master, adjudged that the amended bill of complaint should be dismissed for want of equity, and decreed that Russell and Ashton recover from Andrews the sum of \$56,397.20, with interest at 5% per annum from December 21, 1929, and costs.

Plaintiff's contend that the findings of the decree are against the manifest weight of the evidence; that the relationship of Yeomans, Inc., of agency for complainants was terminated through the conduct of Yeomans in conspiring with mussell and manten to dissipate the funds of Andrews deposited to the joint account; that the New York judgment obtained by Yeomans, Inc., against Andrews is not res adjudicate of the issues as between them.

We have been presented for examination with a record of almost 1500 typewritten pages, and more than 100 written exhibits, some of which are very technical. The complainants have filed an abstract of 261 printed pages. Cross-complainants deeming this insufficient have filed an additional abstract of 249 printed pages. The result is that we have been compelled in many instances to

Interest to start the contract of the contract

end the case wis impute being a carefully and fine and fine and great and the case wise impute being a carefully and fine and fine and fine and another and fine and

Plaintiff our test to the Charles of the end of the end

Je leve benn skanteled fry group that the tending of the contract of the contr

The state of the s

examine portions of the record many times,

The controlling question in the case is presented by the contention of plaintiffs that the findings of the master are against the manifest weight of the evidence. We shall first, however, dispose of certain points of law urged by plaintiffs.

It is seriously argued that the suit in New York in which Lucien I. Yeomans, Inc., obtained a jud went against Andrews is not an adjudication of the issues as between them, and that the decree errs in so finding. Plaintiff's cite Chicago Theological Seminary v. People, 189 Ill. 439; and People ex rel, Lloyd, etc., v. University of Illinois, 357 Ill. 369, in each of which the court had under consideration the question of whether a claim of exemption for taxes had been deter ined and adjudicated by prior proceedings. The law stated in those cases is not at all applicable to facts such as are disclosed here. It appears from the record of the Lew York court, which is in evidence (and which has been only partially abstracted by plaintiff's), that Yeomans, Inc., sued Andrews in New York and filed a complaint in which it declared for services rendered by it to Andrews under the contract of may 11, 1929, which is the same contract here sued on: that Andrews answered admitting the execution of the agreement, expressly denying that Yeomans. Inc., complied with the terms and conditions of the contract, or that the sum demanded was due and payable. It also appears that Andrews there set up as part of his affirmative defense his own contract with Yeomans of May 11, 1929, and also the contract of Andrews with Russell and Ashton of the same date; averred the relationship of Yeomans, Inc., with reference thereto, and finally by the 14th paragraph of his enswer averred upon information and belief the same conspiracy between Yeomans, Inc., and Russell and Ashton which is ere averred in the abended bill. All this was set up in the kew York suit by way of defense to the action for services rendered by

en loge there is the artifact each war

again to matter of the total actions of protection and against the contraction of the con

. noich I. Messane, the same as a second of the second of may no original profite the form of the contract of the contra decret create in a sile tax, a classic discretization of the contract of the c to the first and a second of the contract of bear, and bit to be seeming a rate of the leading aring or main and the first term of a first of a contract of the contra , control of the con grand the trade and the first of the contract the state of the contract of the er of the contract of the second of the second for seart, write is a value of the control of the contr floracted for pil institute), and they care, as a percent is a continuous of the content is a rope, or mail has and horomorp for all following a well bor Most by is to indicate and a full court of the court of the court of the A. C. Liber, C. Mary Art. of the control of the professor benefit familiated and erecurion of the approximate, a solution is a painting to the contract and complete during the fact of the fact of the contract of the co s and the second of the second there set up as part of him only a circle and the contract with a column to the column and the field, if you lo consert this the change in the second proof of the res to not the box blooms Yeomans, imv., with review are berras, and the day by are letout to his some coins well is now to the to read off to Agenyana such contacts og i trees lie. .... i ... i ... tor ... i gal. ... oli mer et i go winessed is one weared it to member with. It being not as is too em

Lork muit by may of defense to the estion for a griden got. Def by

Yeomans, Inc. The issues, therefore, in the New York case between Yeomans, Inc., and Andrews were in part the precise issues which are here involved. The judgment in favor of Yeomans, Inc., shows that these issues were adjudicated against him in the New York case. Not only did that case determine the amount due from Andrews to Yeomans, Inc., but it also seems to determine conclusively that Ashton and Russell and Yeomans, Inc., did not conspire to defraud Andrews as alleged in the amended bill filed in the Superior court. Since Ashton and Russell could not conspire with themselves to defraud Andrews the determination of the issues involved in the New York suit seems to determine the same issues in the Illinois suit.

The complainants make the further contention that as a matter of law there was an implied warranty that the work required by the contract of May lith smoul! be proper and the goods delivered reasonably fitted for the intended use. Defendants cite a number of cases, such as General Fireproofing Co. v. Wallace & Son, 175 Fed. 650, 99 C.C.A. 204 (certiorari denied 217 U. S. 607). which it is claised sustain this contention. The principle invoked seems to be acalogous to that expressed in section 15 of the Sales act (Ill. State Bar State. 1935, chap. 121a, p. 2807), that where a buyer of goods expressly or by implication makes known to the seller the particular purpose for which the goods are required, and the buyer relies on the seller's skill or jud ment, there is an implied warranty that the goods shall be reasonably fit for such purpose. The transactions here in question were not for the sale of goods, and a preponderance of the evidence clearly slows that the complainants did not rely on defendant's mechanical skill and judgment in so far as producing an article fit for intended use was concerned. It was understood that the work was to be let to subcontractors, and there is no contention here, as we understand the record, that these

การประชานาร เป็นสายเกรียน พระเวลาเป็น เป็นสายเปลี่ยนสายเรียนสายเรียนสายเสียนสายเสียนสายเสียนสายเสียนสายเสียนสา Ber Broom amount the country of the angles of the most are the most and the most am written and a first the second of the second The state of the s 175 Feb. 650, 99 July Control of the City with the although the color of the color of the color ir. : -in Bo di doire a di bersem no a, it ed ame edicam ed ed erece eme. Sold (Vist of pales, 2008, 2008, and Vist of II) too only or other strains are nother limited to the contract of the property of the neutlacter purener for this sum of a merendiner, at the bugs provide as the soller of the soller of the soller of the sollers. warrenty that the prode chail be at early the alteraction and and analysis. ist to, in the contraction the median of the contraction of - au nos . un a o s gira es notablis nel le encompainment a auc or the first state and the state of the stat in so far as producing or trainal state for a factor as all a sa in , and descend that the term of a common of the termination of the common of the com there is no continuion here, we we under that up a continuion of the

were negligently chosen. In this respect this case is not unlike Mismi Cycle Co. v. Lational Carbon Co., 26d Fed. 46, "mere it was contended that the manufacturer of autobobile starters for motorcycles was liable upon an implied warranty, and the court said there was nothing in the record that would justify such a finding: that, "it was understood by both parties that this article had never been manufactured in forms suitable to this purpose; to modify the plaintiff's salf starter used on auto of iles and bouts, and adapt it to successful use on motorcycles, involved questions of design and manufacture with which plaintiff was specially familiar, and questions of combining the starter with and attaching it to motorcycles and using it there, about which plaintiff knew nothing, and as to which defendant would be comparatively expert." Under analogous facts a similar conclusion was reached in Asllog, aringe Company v. Hamilton, 110 U. S. 108; 28 L. Ed. 86; Thielman v. Penisch, 103 Ark. 307, 146 S. W. 525.

We now consider the controlling question, which seems to be whether the findings of the master, as approved by the chancellor, are, as plaintiff's contend, against the manifest prependerance of the evidence. In connection with that point, plaintiff's cite some authorities which state well settled rules. Such, for instance, as Oliver v. Ross, 239 fll. 634, holding that here testiony is taken by a master and the chancellor has not heard the vitasses, the reviewing court is not bound by the rule that the findings of the chancellor will not be disturbed unless manifestly against the weight of the evidence. This is true; nevertheless the findings of a master who has seen and heard the withesses are prima facie correct (Hallinger v. Shapire, 329 Ill. 639), and are entitled to be given appropriate weight by the chancellor and by a court of review. Kauper v. Lette, 239 Ill. 536. Complainants also cite a large number of authorities to the effect that the court is not

The box ownsider to continue a continue aliance. In comment, ancient to continue aliance and anticontition original and continue aliance and anticontition original and continue aliance and aliance aliance aliance and aliance and aliance and aliance and aliance and aliance aliance and aliance aliance and aliance aliance aliance and aliance aliance aliance and aliance and aliance aliance and aliance aliance aliance aliance and aliance aliance aliance aliance aliance and aliance aliance aliance and aliance aliance aliance aliance aliance aliance and aliance aliance aliance aliance aliance and aliance aliance aliance and aliance aliance aliance and aliance and

203 Art. 807, 346 s. V. 53...

bound to believe the statement of a witness which is inherently improbable, or testimony which is contradictory, and that the testimony of witnesses may be so inherently improbable as to be unworthy of belief. All this is elementary law, and we have been guided thereby in our consideration of this record.

We regret that the exceptions do not present the controling point with greater clearness and conciseness. We have examined the exceptions, 29 in number. The decree in substance provides for two judgments. One is that the bill of complaint should be dismissed for want of equity. The other that Ashton and Russell recover judgment against Andrews for \$56,397.20. The original bill against Russell and Ashton and Yeomans, Inc., was based upon the theory that the defendants conspired to defraud the complainants. The judgment rendered in Dew York Finally adjudicated that issue against complainants.

There remains for consideration the question of whether the judiment in favor of Asiton and Russell should have been rendered or, if rendered, was for the correct amount. The evidence shows that the total amount was made up of very many items involving detail transactions, extending over many months. These different items are not specifically challenged. Indeed, an examination of the report of the master shows that such specific items as are criticized by complainants were disallowed by the master and are not included in the judiment randered. The finding of the master is arima facie correct. He saw and heard the witnesses. The statement of an account is particularly within the province of the work of the master. It is for the party opposing to point out specifically and clearly alleged errors. The argument of complainants challenges the whole account on the theory that Asnton and Russell were guilty of fraud. In the bill it was

ueiš zrujo sa miralių dolis ir liktos pas sala vemysų os

the exceptions, is in many of and and the course of the line and the for the foreign to the two sides and the foreign to the same and the standard sides and the same and the

side in the control of the tent of the control of t

charged that in this they conspired with Yeomans, Inc., representing Andrews. The courts of New York have adjudicated that issue contrary to the contention of plaintiffs in so fer as Yeomans, Inc., is concerned. It is for the complainants who set up this defense to point out evidence in the record sufficient to establish it and overcome the findings of the master. Complainants have not done this. Without going in detail over the record we may summarize by saying that our conclusion is compelled, first by the fact that the findings of the master are prints facie correct. Second, that an inference that the same are correct arises by reason of the failure of complainants to present a fair and impartial abstract of the evidence on this point. Third, by a careful audit of the books of account of Russell and Ashton covering these transactions which was made by the auditor of complainants under the direction of their own attorney, which indicates that the amount for which judgment was entered was justly due. Fourth, the clear and convincing testimony of Yeomans, who was acting as the representative of Andrews, and fifth, and finally, by the practical failure of the reply brief to give any sufficient answer to the arguments of cross-complainants' brief, which contains a full and adequate recital and discussion of the facts bearing on this issue. We hold complements have failed to point out evidence sufficient to overcome the findings of the master. For these reasons the decree is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

was too to pure the product of the contract of to I mile in it is an interest to the contract of the contract The. is someoned, as a light to light to the second of and the decided that the second of the control of the second of the seco egy washing true of the color of the translate and the masses yd a trong to 2011 a time to be a control or described by Endough Endougher and while ship he is a limit the of the last that madical actions and an release that there is need to be a selected and the se telt the should far thought in a control of the off and in the said of the particle of the parties of the said Listuictur ja rein ir heir glinn est boom field ferire an eff yd which full to the transfer and among the fill to the control of th assured that he address the control of the first and a subject of the subject of the first and a subject of the subject of the first and a subject of the subject secritic on the foods, we note out I with a no prince to the to the out evilance sufficil . & to crespon and free of ind a crespon

HUMPHREY TRIMBLE, (Plaintiff)
Appellant,

VS.

HARRY MANASTER AND BROTHER, ; INC. , a Corporation, (Defendant), Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

289 I.A. 623<sup>3</sup>

MR. PRESIDING JUSTICE MATCHETT DELIVERED FILE OPINION OF THE COURT.

This is an appeal by leave given the plaintiff from a judgment entered in favor of the defendant in an action for damages for false arrest and malicious prosecution. The declaration filed April 5, 1935, in two counts, charged in substance that the defendant. intending to injure plaintiff, on July 14, 1934, appeared before Judge Howard Hayes of the Municipal court of Chicago, and falsely, maliciously and without any reasonable or probable cause. charged plaintiff with having feloniously stolen smoked and canned meats to the value of \$35.00, the personal property and goods of Harry Manaster and Brother, Inc.; that without any cause, knowing the charge to be false and malicious, defendant procured the judge to issue a warrant to bring plaintiff before him for the supposed offense, and that thereby caused and procured the plaintiff to be arrested and imprisoned on the same day and the day following until plaintiff wave bond for his appearance on July 16, 1934; that on July 27, 1934, the accusation was heard by Judge Brickson of the Municipal court, when it was determined that plaintiff was not guilty of the supposed offense. The cause was dismissed and plaintiff discharged out of custody, fully acquitted, etc. Defendant answered that it caused the complaint to be filed against plaintiff after he had been accused by other employees of being an accomplice in the taking of the property of defendant, and relying upon statements and accusations so made which were believed to be true: de-

AND SHOW TO COMMAND (1994)

e 17

Control of Section Section 2003.

in the contract with the contract to the

seem action to be now a continuo no a constituto for deserve setti nel Angil 5, 1983, in its country, a confident to see well to se mate there the tentile and the control of a control of a control of falosly, religious de como factor de como en esta como en esta mair and form a gar do notice is it; said, to read the transmit that the course of the control of the con to ut it is all the second of the land of man a la ting in fill and an analysis of a said band even tribales July 27, 1680, ive succention where the property of the solution of real rule 3 al 1 mar e al art. North frais i grano figloloro. were to the control of the mean day, finding a control in the control of the etable and a series of and of such account with bords of the though contracts. Z. J. D. D. H. S. L. N. G. G. G. G. C. C. C. C. V. C. C. D. D. C. G. G. B. M. D. C. be the taking of the property of her had, and religious agence is wal jourd of the specified and lights often the analternoon bas start

nied that it had acted maliciously and without reasonable or probable cause in procuring the warrant for plaintiff as alleged, and denied that the cause was dismissed and plaintiff discharged and acquitted as alleged in the complaint, or that plaintiff had sustained damages as alleged. Plaintiff gave evidence tending to support the allegations of the declaration. The sole questions for determination upon the trial of the cause were issues of fact as to whether defendant caused the arrest of plaintiff maliciously and without probable cause. The question in the trial court was whether the material averments of the declaration were established by a preponderance of the evidence. The question for determination in this court is whether the finding of the trial court is clearly and manifestly against the weight of the evidence.

The evidence shows that plaintiff, prior to his arrest. was a man of good reputation; that for a period of one year prior to July 14, 1934, he was employed by defendant at its plant located near 37th street, Chicago, as a night watchman. Defendant was engaged in the manufacture of meat products. Plaintiff was accustoned to begin his work at twelve o'clock at night and continue until six in the morning. His duties consisted in part of pulling 14 boxes located at various places inside and outside of the building in which defendant's business was transacted. At the time he began to work for defendant he was instructed in the nature of his duties by another watchman, who informed him that there had been much stealing from the plant. Defendant's superintendent, Walter I. Aincaid, also informed him that wood, barrels and meats had been stolen from the plant right in the middle of the day, and that plaintiff should be alert and watch. About four days before the arrest of plaintiff Kincaid, superintendent of defendant's packing house, missed several articles of property, and about the same time visited a saloon conducted by one Steve Brazinski at

gradition of the marking and the state of the state into the

The property of the contract o

37th place and Morgan street, near defendant's plant; while there he saw some of defendant's property in the ice box in the saloon; he spoke to the bartender about it and was told by him that the property and been brought over to the saloon from the larry anaster plant by the night sokaman, sucha, and the night scrubman, Schodrof. and exchanged for whiskey and beer. The following morning the bartender visited the plant of defendant and was interviewed by Mr. Harry Manaster, first vice-president of defendant company, in the presence of the superintendent, where he repeated his story that Bucna and Schodrof had brought defendant's goods to the saloon. Superintendent Kincaid then got in touch with Captain Hughes of the police station, who advised him to swear out a/warrant to search the premises on which the saloon was located, and this was done July 14, 1934. The saloon was raided and sundry goods of the defendant found and removed, On the same day Bucha, the night smokeman, and Schodroi, the cook, and Mr. Walters, the scrubman, employers of defendant, were arrested by the police department of Chicago. On the same evening when plaintiff Trimble arrived to go to work he also was arrested and taken to the police station by a police officer, placed in a cell and detained there until the early morning of July 16, 1934. At a later hour on the same morning plaintiff appeared in the criminal branch of the Lunicipal court with the other defendants; his case was continued to a later date and then sent to the Felony court where on July 27th Bucha, Schodrof and Walters pleaded guilty, and the State's Attorney ont red a nolle as to the charge against plaintiff Trimble. Frior to the arrest of plaintiff, Bucha made a statement to the police, which was reduced to writing and si ned by him, although it is undisputed that he could not read or write the in lish language. The evidence shows, however, that it was read to aim before he signed it, and in

his statement he implicated the plaintiff in the sterling of the goods. Plaintiff denied the accusation in the presence of Bunca and the police officers, and denied it with an oath.

Mr. Harry Manaster visited the police station on Sunday morning, July 15th, after the arrest; he was informed by the police of the statements made by Bucha and others tending to implicate the plaintiff, and on the following day Mr. Manaster signed the complaint for a warrant against plaintiff and upon the advice of the police and upon information given him by them as to the accusation made by Bucha and other employees to the effect that plaintiff had suggested they should take the goods and exchange them for drinks, and had joined with them in drinking the liquor so obtained. Prior to this time the testimony shows, defendant did not suspect plaintiff of stealing. There was no ill feeling between them of any kind. The evidence shows without question that Manaster, the vice-president, caused the arrest of plaintiff; that upon the trial of the cause the plaintiff was discharged; that he was not in fact guilty of the offense, and the sole question for deter ination upon this record seems to be whether, under the evidence as sulerized, it can be said that L master, in swearing out the warrant, acted vituout probable cause. In Barpham v. Whitney. 77 Ill. 32, the Supreme court of Illinois said:

"Probable cause is defined as such a state of facts, in the mind of the prosecutor, as would lead a man of ordinary caution and prudence to believe, or intertain an honest and stron, suspicion that the person arrested is guilty. Bacon v. Towne et al., 4 Cush. 217. It does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencia, the prosecution. James v. Phelps, 11 Ad. # El. 483, 489; Foshay v. Ferguson, supra.

483, 489: Foshay v. Ferguson, supra.

A belief of the guilt of the accused, founded on circumstances tending to show that he has committed a criminal offense, is sufficient to show probable cause. Jacks v. Stiapson, 1% Ill.

70%. "

The rule stated in this case has been consistently followed in a long line of cases by the Supreme and Appellate courts of this

The state of the section of the sect

and of particular earlies has visitely after many and he collors

Of one ording and the contract of this contract

<sup>\*\*</sup>Proback to de se is the delice of the control of the control of the proback of the proback of the control of the proback of the control of

torallal ylanosmi...os de d'an , emec ed a l'abbas a súsa end ains la sár de les competences de carro cologá a sas lo emb

State. Glenn v. Lawrence et 1, 280 III. 581; Ellsworth v. Peoples
Life Ins. Company, 247 III. App. 161; Farris v. Messimore, 219 III.
App. 582; Makarewicz v. Mational Lead Co., 264 III. App. 16; Ferner
v. Prairie State Bank, 281 III. App. 31. The cases also mold that
the burden of proof in a case of this kind is upon the plaintiff.
Krebs v. Thomas, 12 III. App. 266; Levinson v. Inchas, 174 III.
App. 68. The fact of the discharge or acquittal of plaintiff
does not show or tend to show want of probable cause or the presence
of malice. McBean v. Ritchie, 13 III. 114; Lura v. Unaw, 20 III.
354; Tuebbecke v. A. M. Rothschild a Co., 152 III. App. 321;
Rioduszewski v. Spo. anitz, 209 III. App. 118. To justify a finding
of malice it must be shown that plaintiff was actuated by improper
motives. Giroux v. Goldman, 208 III. App. 261; Farris v. Leesimore,
219 III. App. 582; Glenn v. Lawrence et al., 280 III. 581.

The question for the trial court was whether defendant acted with malice and without probable cause, and the burden of proof, as already stated, was on the plaintiff to establish that controlling fact. In this court the question for determination is whether the finding of the trial court, who saw and heard the witnesses, is against the clear preponderance of the evidence. In determining that question, the finding of the court is entitled to the same weight as the verdict of a jury. It is impossible on this record to so hold. In the first place, there is no doubt the crime of larceny as in fact committed and had repeatedly been committed while plaintiff was acting as defendant's watenman. Plaintiff was accused by the statements of his co-employees. While it is true that the testimony of an accomplice is always acted upon with great caution, (People v. Spira, 264 Ill. 243; People v. Cotell, 298 Ill. 207; People v. Sapp, 282 Ill. 51) we taink, under all the circumstances, it cannot be said that defendant acted without probable

THE RES. OF CO. P. C. S. ST. ST. CO. ST. SEC. SEC. SEC.

ored, or element to been, menter and a constitution of a constitut

cause in believing plaintiff to be guilty, although the evidence given upon the trial indicated that he was in fact not guilty.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

oungi e, keir i viet a genale a er filtranie Ala ist al pamero - Companie de Companie a en al companie a en

CHICAGO CITY BANK AND TRUST COMPANY, as Conservator of the Estate of Catherine L. Bromstedt, an insane person,

Plaintiff,

VS.

MARTHA PASCHONG, ARTHUR W. BROWSTEDT, ETHEL R. MARTIN, WILLIAM F. BROWSTEDT and BARL BROWSTEDT, Defendants and Appellees,

and

MART BROMSTEDT, TRANK MARTIN, MABEL.
BROMSTEDT, STHEL BROWSTEDT, CHORGE LENZ,
CHRISTOPH H. DEHNING, PETER W. MAYN,
GOLDBLATT BROS., INC., HOPFELD, INC.,
ALBERT HORFELD, ACE DRUG STORES, INC.,
JOSEPH L. GILL, County Treasurer, and
CONTINENTAL ILLINOIS NATIONAL BANK AND
TRUST COMPANY.

Defendants.

and

SIXTY-THIRD AND HALSTED REALTY COMPANY, a Corporation,

Defendant and Appellant.

On Appeal of SIXTY-THIRD AND HALSTED REALTY COMPANY, a Corporation,

Appellant.

289 I.A. C23

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

AR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Realty company from an order entered by the Circuit court of Cook county July 17, 1936, upon the petition of certain intervenors, appointing a receiver for premises in the City of Chicago, and directing that rents which had accumulated under an escrow agreement should be distributed to the petitioners. That part of the order appointing a receiver being of an interlocutory nature was considered by this court on a former appeal - 287 Ill. App. 1. The facts are fully stated in that opinion. The order was reversed for the reason, as stated in the opinion, that the circuit court was mithout jurisdiction

offered earth of the centre of a control of the offered and control of the centre of t

1. 21.

, and a late to the

Land Silver Color of the Color

athe besteen

F-11.

e 63 d 44

the distance of the day have the

The characteristic of and Million Co.

init is no verified or while and point and property of the analysis of the control of the contro

because the Superior court of Cook county had obtained jurisdiction of the res in a prior proceeding. We there said:

"Clearly, in order to persit the superior court to make effective any judgment or decree which might be entered in that cause, its dominion and jurisdiction over the moneys in question should not be disturbed. Assuming that the superior court should enter a decree as prayed for by the realty company and it should be found that the receiver in the circuit court had possession of the money or had already distributed it, the decree of the superior court would have nothing upon which to operate and would be merely an empty gesture.

The pleadings before the circuit court chancellor apprised him of all these facts. The petitioners should have been sent to the superior court to make application for a receiver.

The appointment of the receiver herein was an attempt to oust the superior court of the jurisdiction over a subject matter which it had obtained long prior to the filing of the petition herein.

The reasons there stated are also applicable to that part of the order of July 17th which we are called upon to review in this proceeding. Lanifestly, if the court was without jurisdiction to appoint a receiver temporarily for the funds, it was also without jurisdiction to make a final distribution of the same funds. That decision states the law of the case, by which we are now bound on this appeal. Gridley v. Noo1, 22, Ill. App. 46: Wolkau v. Wolkau, 217 Ill. App. 471. It follows that this order also must be reversed.

REVERSED.

O'Connor and McSurely, JJ., concur.

eni van e leve i erak ve i se i serve levenus. Doirens pud savana Gli e serve serve serve serve voin o di gag nou ko noda

and the control of the control of the property and beginning

The term to the contract of th

The are now being a control of the property of the control of the

the second

NATIONAL BUILDERS BANK OF CHICAGO. a Corporation, Plaintiff - Appellee,

ys.

OTTO FRERK and ELATERA FRERK et 1. Defendants-Appellants.

APPHAL FROM SUPERIOR COURT OF COCK COUNTY.

289 I.A. 6241

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

July 3. 1935, plaintiff filed its bill to foreclose a trust deed executed by defendants. Otto Frerk and Elmera Frerk, his wife. on June 11, 1932, whereby to secure their principal note for \$25,000, due five years after date, with interest payable semiannually, they conveyed and warranted to the plaintiff, as trustee, an undivided one-half interest in certain premises described, situated in Chicago, Cook county, Illinois. The bill contained the usual averments as to execution, delivery, default, etc., and prayed for an accounting, a decree of sale and foreclosure. The bill was duly verified.

Defendants filed an amended answer and counterclaim, which were also verified. Plaintiff moved to strike the answer and counterclaim. The court sustained the motion. Defendants elected to stand by their pleading and were defaulted for want of an answer. The cause was referred to a master who took the evidence and reported finding the equities with plaintiff, overruled objections, and the chancellor entered a decree of foreclosure in conformity with the report of the master. To reverse this decree defendants appeal. The sole question for determination on the record is whether the court erred in striking the amended answer and counterclaim.

Defendants, by their answer, which they also call a counterclaim, sought to interpose the defense that the trust deed was void as being executed and delivered contrary to the provisions of an

g military market in the second of the secon

A second of the s

Posts and washing, the contract of the contrac

do not for the control of the beneficial medicate as paint as

act concerning future interests, pproved July 2, 1921. (See Illinois Session haws, 1921, p. 470; Ill. State Bar Stats. 1935, paragraph 24, p. 5151.) This statute provides in substance that no future interest shall fail or be defeated by the determination of any precedent estate or interest prior to the happening of the event or contingency on which the future interest is limited to take effect.

Defendants, by their amended answer, admitted all the allegations of the bill of complaint except that, relying upon the statute above described, they denied that at the time of the execution of the trust deed on June 11, 1932, they owned an undivided one-half interest in the real estate conveyed by their deed. They averred they were not the owners in fee simple but merely "vested or contingent recainder en. " their interest being subject to a life estate in Albertine frerk, mother of Otto Frerk. The answer set up that defendant took title under the sixth clause of the last will and testament of Henry Frerk, father of Otto and Alfred Frerk: that Alfred Frerk died after the death of the father: that Albertime Frerk, the mother, was still living; that this will was dated April 21, 1910, and admitted to probate by the Probate court of Cook county May 25, 1910. The sixth paragraph of the will, under which defendants took title, was as follows:

"Sixth: I give, devise and bequeath unto my said wife, for and during her natural life, that is to say, a life estate in the premises known as the Yards, \*\*\* and I give, devise and bequeath all of my said last mentioned property, known as the two Yards \*\*\* upon the death of my said wife, to my two sons, ALFRED FRERK and OTTO FRERK, in equal shares, to have and to hold thesame and to their heirs and assigns forever, the child or children of said sons, upon their decease, to take the share the son would have taken if living."

The amended answer averred that the interest of defendants under this clause of the will was either vested or contingent.

Manifestly it could not be both. It was either one or the other, and the law of this State favors the vesting of estates. We are quite at a loss to understand upon what theory defendant contends

A TRANSPORT OF THE PROPERTY OF THE PROPERTY

entions of the eller of the firest of the entire of the en

and the first term of the same of the same

The little of the contract of the Cifer in the Contract of Aid Telemon.

The little of the Contract of the Contract of the Cifer of the Contract of the Contra

that the statute relied upon is applicable to the interest which he took under the sixth clause of the will. In <u>Lachenmeyer v.</u>

Gehlbach, 266 Ill. 11, the Supreme court of this State construed a will which contained a provision substantially similar, and said:

"\*\*\*\* Interpreting the will in the light of established rules and having in mind the favor with which the law regards vested estates, we conclude that the testator meant to give his widow an estate for life and a vested remainder in fee to his children. The remainder to the children is, however, subject to the smilting executory devises in the event that any of them die before the life tenant's death, either leaving children who would take or without children, when the share would go to the surviving children. The gifts over if the children die, with or without children, are executory devises, which are not destructible. The fee of the children, whether vested in interest, only, or vested in possession, in case the life estate should terminate prematurely before the life tenant's death, is subject to the executory devises over, and any conveyance by them would carry with it the limitations which will become effective upon the happening of the events specified in the will."

A similar rule was applied in Warrington v. Chester, 294 Ill. 524, and Boye v. Boye, 300 Ill. 508.

We hold that the interest of defendant was vested and that the statute invoked was not applicable. But even if the estate devised were held to be a future interest, we think the mortgage was not void under this statute. The law is that remainders can be sold. encumbered and sonveyed; (Curtiss v. Root, 2. Ill. 518); that all kinds of vested, contingent, and future interests may be most aged. Jones on Mortrages, (Sta ed.), sec. 191, page 226. Reeves Illingis Law of Mortgages and Fereclosures, vol. 1, sec. 90, page 117. Hanifestly, the mortgage would not have the effect of destroying the remainder even it it were held to be contingent. Moreover, upon the plainest principles, the defendant, having by his deed warranted and conveyed an estate in fee, is now estopped to assert the contrary in these proceedings. The cases holding so are so numerous as to make it unnecessary to discuss them in detail. Dobeins v. Cruger, 108 Ill. 1-8; Roderick v. cleekin, 204 Ill. £25; Bittner v. Field, 354 Ill. 716; Terre \_\_\_trust Co. v. Wells Thip

ting the contract of the contr

The control of the co

Supplied to the second of t

Co., Me III. App. com; onicano little and reast co. v. Wallace, 250 Ill. App. 295.

He hold the court did not err in striking the amended answer and the counterclaim. The decree is therefore affirmed.

O'Connor and LoSurely, JJ., concur.

Later to the state of the state

THE FIRST NATIONAL BANK OF CHICAGO, Appellant,

vs.

ELIZATETH MARTIN et al., Defendants.

GEORGE S. MARTIN,

Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

209 I.A. 6242

FR. PRESIDING JUSTICE MATCHETT DELIVERED THE CPINION OF THE COURT.

July 16, 1936, plaintiff bank, is successor trustee, filed its hill to foreclose a trust deed executed October 29, 1926, to secure a principal indebtedness of \$35,000, represented by a note of defendants executed and delivered on the same date. The trust deed conveyed several parcels of land which were improved with a two-story brick house containing sixteen rooms and a basement. The building is used as a night club. The bill was duly verified, contained the usual averments and alleged that the premises were scant and meager security for the indebtedness in that the indebtedness was then, with accrued interest, etc., in excess of \$43,000, while the value of the premises was less than \$40,000.

august 12, 1936, defendant George S. Martin, one of the owners of the premises and one of the makers of the principal note and trust deed, filed a petition in which he averred he was an owner and managed the property in behalf of all the owners; that on May 31, 1936, the premises were rendered untenantable by fire; that he engaged an adjuster to adjust the loss; that on July 8, 1936, having been informed that the insurance companies had made an offer of \$3400 in settlement of the fire loss and might pay as high as \$3800, he entered into a contract with J. E. Barry & Co. to repair the premises according to an itemized list of repairs agreed upon by the adjuster; that Barry & Co. proceeded from July 8th to July 13,

god na komponinski politika i komponi

to an in the contract of the c

in the second se

Explication of the state of the

AND THE RESTREE OF THE PROPERTY OF THE PROPERT

1936, to make such remairs; that on July 10th, at a conference in which Mr. Pollack represented the plaintiff, he informed Mr. Pollack of the offer of settlement, and Pollack said he sew no reason why the bank would not continue with the loan on the same basis provided arrearages were paid in full; that at the suggestion of the plaintiff bank the petitioner instructed Barry & Co. to hold up the work on the building temporarily; that thereafter petitioner settled the fire loss for the sum of \$3582.84; that on July 22, 1936, petitioner made a written proposition to the plaintiff bank stating that arrearages on the loan would be paid in full if the bunk would continue the loan in force and also agree that the money received from the fire loss should be applied on the contract with Barry & Co. for the repair of the premises. The plaintill kank declined the proposition and notified Barry & Co. not to carry out the contract with petitioner. The petition evers the contract is fair and reasonable, was entered into before the plaintiff filed its bill to foreclose; that the repairs are necessary in order that an income may be realized from the premises. Petitioner had a tenant ready. willing and able to enter into a lease of the premises as soon as the rehabilitation was made; that as the contract with Barry a Co. was not carried out, petitioner and other owners would be held liable on their contract. The prayer of the petition was for an order directing Barry & Co. to proceed with the repairs and ordering the insurance companies to pay the fire loss moneys to J. B. Barry & Co. This petition was duly verified.

August 13, 1936, plaintiff filed its motion to strike the petition because the court was without jurisdiction of the subject matter, namely, the contract between Barry & Co. and George S. Hartin; that the court did not have jurisdiction of Barry & Co., nor jurisdiction of the insurance co. panies. The motion of the plain-

 See a superior of the contract of Har the second of the second o the contract of the section of the s energy are a local to the control of with pottley by the colour of the colour of the colour Later and D. M. Williams of the control of the particle of Companies. The state of the s and the state of t I have been all to be a control of a vertice of a health little the contract of the contract of the contract of

estimate of the control of the contr

tiff to strike the petition was denied and leave granted the petitioner to smend his petition by striking out the last paragraph, which contained the prayer, and in lieu thereof inserting a prayer "that an order be entered directing the plaintiff and such defendants as said fire loss may be payable to, to permit J. E. Berry & Co. to complete said contract and to apply the proceeds of said fire loss toward the payment of said contract." An order was thereupon, on September 2nd, entered by the court substantially as prayed in the amended petition. September 4, 1936, plaintiff moved the court for an order vacating the order of September 2nd, and that plaintiff might have a reasonable time to answer defendant's petition. This motion was denied, and plaintiff gave notice of and perfected this appeal from the order entered September 2, 1936. The petitioner has not appeared in this court to support the order entered.

The trust deed provided in substance that as additional security for the payment of the indebtedness the mortgegors should keep the buildings and fixtures insured against loss or damage by fire for the full insurable value thereof, in insurance companies to be approved by the trustee, and to make all sums recoverable upon the policies payable to the trustee for the benefit of the holder or holders of the principal note, by the usual mortgages or trustee clause to be attached to such policies, and to deliver all such policies to the party of the second part; and that in case of failure of the mortgagors to so insure, the party of the second part might procure such insurance, the cost of which should become additional indebtedness secured by the trust deed, etc.

The plaintiff contends, citing Wilson v. Hakes, 36 Ill. App. 539; Grance Fill Company v. Tastern Assurance Co., 113 Ill. 396, and similar cases, that this was a matter of contract between the parties and that the courts were without authority to alter or

The court of a court of the cou

Line of the control of

Possession of the second colors of the second color

The state of the s

vary the terms of the contracts, but could only interpret or apply them. The Far er-Veshin ton Company v. The City of Chicago, 267

Ill. 136; The libernian English A sociation v. Davis, 295 Ill.

537. This contention must be sustained. The amended petition did not set up grounds for relief in equity. It was error to enter the order of September 2nd, and it will be reversed.

REVERSED.

O'Connor and McSurely, JJ., concur.

Andrew An

GUISEPPE TITO, Executor of the Last Will and Testament of the Estate of LARIA MICOLA TITO, Deceased, Appellant,

VS.

SOCIETA AGRICCLA OPENAIA S. CALCTOPORO E. LARIA VERGINE IL CORONATA DI RICIGLIANO, a Corporation,

Appellee.

APPLAN FROM AURICIPAL COURT OF CHICAGO.

269 L.A. 6243

AR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This suit, originally begun by plaintiff as executor of the last will and tostament of his deceased wife, maria micola Tito. was thereafter by leave convinued by plaintiff in his individual capacity. Defendent is a fraternal insurance society organized under the law of Illinois, of which Laria Ricola Tito was a member in good standing at the time of her death. The suit was brought for a bulance alleged to be due under the by-laws of the society as a Mortuary Benefit. Under Articles 23 and 29 of the by-laws of the defendant society as the same formerly existed, it was provided that the society would upon the death of a member pay \$500 to the family for funeral expenses. The constitution and by-laws provided that this money should be raised by a mortuary per casita tax upon members of the society which should be fixed by the assembly of the society at the first meeting in December for the I'cllowing year: that the quota might vary annually according to the number of members, due to the fact that the family of the deceased should receive \$500. Mrs. Tito died December 9, 1932. She had been a member of defendant society since its organization and always paid her dues. December 4, 1932, just five days prior to her death, the by-laws and constitution of the society were charged so as to provide that on and after that date monthly dues of merbers should be 80g each and mortuary dues pl.00 a me per: \$5 a week

Marketter in delice of particle Advisors. In the following the control of the particle and the control of the c

· ·

antimate of the continue in the continue of th

entino de la companya de la companya

in the state of th

should be paid during illness not to exceed 13 weeks in all, the first and the last three and the excess days over even weeks not to be included. The mortuary benefit should be all a member for the number of members "current." Defendant society paid the amount due under the by-laws as amended, namely, \$250, but resists payment of the balance upon the ground that Karia Nicola Tito was present at the meeting where the amendments to the by-laws and constitution were made, and had knowledge thereof, consented to and acquiesced in the same. Kovember 27, 1933, defendant society issued its check to the order of plaintiff as neir of the deceased for \$250. The check is in evidence and bears on the back an endorsement as follows:

"Full and complete release of all claims a/c Death Benefit accruing to Estate of Maria Micola Tito, - Deceased." This release is signed, "Jos. Tito---heir of Maria Micola Tito Deceased."

Plaintiff testified that this endorsement was on the back of the check when he affixed his signature thereto, which he admitted to be genuine. He says that when the committee from the defendant society offered the check to him he said he would not take a check except for the full amount of \$500, but was told to take the check, and that if Frank Taglia, whose case was then pending in the Appellate court, got the balance he was suing for. plaintiff also would be paid the balance, notwithstanding his acceptance of the check. Ar. Catena, whose endorsement appears on the check following that of plaintiff and who delivered the check to plaintiff, testified, denying this conversation and says that he spoke to plaintiff at the wake and told him that the society had reduced the amount to be paid, and that the reduction had taken effect on December 4th; that plaintiff replied that he knew this; that his mother was at the meeting when the change was made. came home and told him the rate had been rejuced to al a nember.

The state of the s

and the state of t

and that she was glad of it. He says that plaintiff hesitated when the check was first tendered but afterward told him he had decided to take it, and that they then went to the Bank Mapoli where the transaction was completed. His testimony was corroborated by also several witnesses, and testimony was/given to the effect that the deceased was present at the meeting when the by-laws were amended and declared herself in favor of the change.

The court heard all this evidence and disregarding, as we must present, all incompetent evidence, made a finding for defendant and entered judgment thereon.

Upon two former appeals the question of the liability of defendant society to persons who became members prior to December 4, 1932, in view of the change of the by-laws on that date reducing the amount to be paid, has received consideration from this court. In Taglia, admr. v. bocieta, etc., 279 111. App. 535, the of intiff in the trial court recovered a judgment for the balance of \$500 found to be due as a mortuary benefit under the original articles of the by-laws. The original followed the rule 1 and fown in Covenant Mutual Life Assn. v. Kentner, 188 Ill. 431, to the effect -

"If a member agrees that future by-laws or amendments shall enter into and form a part of his contract and modify or vary it, he will be bound by such by-laws or amendments because they are a part of his contract. \*\*\* Unless there is an express agreement that a member shall be bound by future by-laws varying or modifying his contract, he is not so bound."

The court in the Taglia case said:

"Amended article 29 of the by-laws might well be effective as to future members of the society, as well as to all those who were members at the time of its enactment who assented to it, but we are constrained to cold that it could not vary or addity plaintiff's rights under the contract of the insured with the society."

In Peter quaracino, adar. v. Societa Articola, etc., 286
Ill. App. ; 3 A. E. (2d) 352, the question of the rights of former members was again considered, and a judgment for the full amount of \$500 affirmed upon the theory that the member did not

The state of the s

to the last the last the last took bus

grand and the country of the country

the state of the state of the state of the state of the state of

Approved to rise of the state o

The annual control of the control of

: I are of fore the distance of

and which the second of the control of the control

Let up the many the second of the second sec

give her consent to the change in the by-laws reducing the amount of the mortuary benefit. We there said:

"In the instant case we hold that since the member, are quaracino, did not consent to the change in the by-laws whereby the mortuary benefit of \$500 was reduced to \$1 per member, such change was ineffective as to her or her family."

We there eited in support of this Jones v. Losleen suital hemefit Assoc., 337 Ill. 431, and York v. Central Ill. relief assoc., 340 Ill. 595.

The Taglia and Quaracino cases are clearly distinguishable from the instant case in that in each of them the trial court found as a matter of fact that the deceased member did not consent to the change in the by-laws. In this case the finding of the court is that the deceased member consented/and veter for the change. The endorsement on the cueck establishes by a clear preponderance of the evidence that the rights of the parties were after consideration settled, and the acceptance of the check amounted to a release of any claim for further benefits. The issues of fact being settled by the finding of the court in favor of the defendant, the judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

and the second of the second o

e e proposition de la company de la company

The first of the first of the second of the

.

HARCLD EPSTEIN et al., Appellees,

VS.

ALVIN C. DUNAS et al., Defendents.

On appeal of Fall, Fl. J. F,
Defendant and
Petitioner.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

2891.A. 6251

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Fannie Pinsler, defer dant, appeals from an order which overruled her objections to the final account and report of Lilton H. Morris as receiver in forecassure proceedings, and also from the order which denied her petition that Epstein, the complainant, Morris, the receiver, Jesse Sissman, the receiver's attorney, and Peter Sissman be directed to pay her certain sums of money aggregating apparently approximately \$3700.

The basis of defendant's claim seems to be that Morrig was improperly appointed receiver of premises of which she was a half owner, without notice to her; that the proceeding in which he was appointed was subsequently dismissed for want of prosecution, hence she is entitled to one-half of the money collected by the receiver.

October 8, 1929, complainant Epstein filed his bill to foreclose a second mortgage; defendant Fannie Pinsler was made a party defendant with others but she was not served with summons or by publication.

October 14th milton H. Morris was appointed receiver of the premises, upon notice served upon the former oner, Dunas, who had executed the second mort age papers. Subsequently, in September, 1930, it was ordered that the receiver pay mimself \$350 and Jesse Sissman, his attorney, \$250.

755 A. 1835

والمراكمين الله المنابعة فالداران الماران

All and the second of the seco

and transfer as a second of the second of the second of all all and an expectations of the second of

The solution of the solution o

Consider the first of the control of

vectored is the eilitary of an orbital control of orbital control of the end orbital and the end of the end of

June 19, 1931, the West Side Trust and Savings Bank filed its bill to foreclose the first mortgage on the premises, and on June 29th the court in the Epstein foreclosure ordered that the receivership of Morris be extended to the Bank foreclosure case, and the receiver was ordered to continue in possession and collect the rents, which he did. Thereafter he filed his current reports and accounts and his final report in the Bank case.

July 29, 1932, upon demand of the trustee in the Bank case and a perition presented and upon direction of the court, the receiver surrendered possession of the premises to the trustee. The defendant did not come into possession of the premises at this time but possession was in the trustee under its prior right.

August 10, 1934, an order was entered dismissing the Epstein foreclosure case for want of prosecution. Counsel for the appellees say that this order was entered by misprision of the clerk and present facts and orders of the court tending to sup ort this contention.

April, 1936, defendant Pinsler filed her petition in the Epstein case; answers were filed and the court entered an order to the effect that the receiver had filed his final account, which was approved, in the Lank foreclosure case, but that no reports had been filed by his in the Epstein case; the receiver was increupon ordered to file his account and his report in the Epstein case within five days; the receiver filed such a report, from which it appeared that he had filed his reports and accounts in the Eank case, which were approved, and on July 28, 1932, filed in the Bank case his final report, which was there approved.

Defendant filed objections to this report, but on June 8, 1936, the report in the apstein case was approved. The court found that there was a balance on hand of \$826.27 in the hands of the receiver, which he was ordered to deposit with the clerk of the court; the court also found that the apstein case and been dismissed but

A SITE AND A SITE OF THE STANDARD TOWN OF A SITE OF A SI

### 1. A. F. 1. A. F.

Li egi en gale a de la collectión de deserva de la collectión de la collec

The time of the control of the first of the control of the control

talentes to the control of the control of the proving the control of the control

that the court had jurisdiction to dispose of all matters pertaining to the order of distribution of the \$926.27 on deposit with the clerk of the court; defendant's objections were overruled and the final report of the receiver was approved and he was discharged.

This is one of the two orders appealed from.

May 23, 1936, defendant filed a second petition in waich she alleged that jurisdiction had never been obtained over her until she entered her appearance in April, 1936; alleged that Epstein was not the owner of the second mortgage and trust deed and that the actual owner was Peter Sissman, an attorney; that prior to the date the receivership had been extended to the Bank case the receiver had paid himself and Jesse Sissman, his attorney. pursuant to orders, \$1100, of which \$450 was paid to the attorney, and the petitioner asked that this \$450 be repaid to her. The petition is quite lengthy, setting forth in detail many orders of the court but alleging, in substance, that by the dismissal of the Epstein case the receivership was vicated and all orders directing the receiver to make payments were vacated and were void, and she asked that the appellees be ordered to repay her the amount of such payments. All parties were ruled to answer this setition and after hearing the court again entered an order Finding that the report filed by the receiver in the Epstein case was correct and that none of the objections were well founded; that a final account had theretofore been filed in the Bank case, which was approved, and that this allowed certain sums to Morris and to Jesse Sissman.

July 29, 1936, an order was entered reciting that due notice had been given to all the parties; that the court and jurisdiction to adjusticate the rights of the defendant finsher and to direct the disposition of the funds deposited with the clerk by the receiver; finds that part of sai! sum, amounting to \$235.85, represents the net rents collected by the receiver prior to the extension of the

State of a community of the first particles of the community of the commun

and the state of t

en en alle des la company de l

 $1 \sim e^{-i \epsilon t} (e^{-i \epsilon t} + e^{-i \epsilon t})$  . The  $e^{-i \epsilon t} (e^{-i \epsilon t} + e^{-i \epsilon t})$ 

numbers of section, the first the contract of the contract of

the property of the second of

Illering the property of the company of the company

and here is a class of the control o

receivership to the Benk case; finds that this belongs to the owner of the real estate and ordered the clerk to pay the defendant Pinsler one-half of that amount. Defendant has appealed from the orders of June 8 and July 29, 1936.

Appellees have filed in this case a plea of release of errors with their motion to disciss the appeal. We have denied this motion, although it was made to appear that on July 29, 1936, a payment of \$117.92 was made to defendant Pinsler, as directed by the court in the order of July 29th from which defendant has appealed.

Defendant rests her case upon the proposition that where a receiver is appointed and the complainant's bill subsequently dismissed, this is an adjudication that the receiver was improperly appointed and hence the owner is entitled to all fees which he or his solicitor have received. Cases like Burrows v. Merrifield. 243 III. 353, and Filmon v. Illinois 3t te formers ac.oc. 379 Ill. App. 476, support this as a general rule. But these mases are not applicable to the present situation. Here, when the Pank foreclosure proceding was contended and the receivers to in the lastein case extended to it, this had the effect of ratifying the appointment in the Epstein case. The complainant in the Epstein case could assert his rights under the second mortgage by a cross bill in the Bank foreclosure proceeding, so that there was no purpose to be served in continuing with the Opstein case as a separate proce ding. Under the circu stances its disvissal had no bearing whatever upon the propriety of the appointment of a receiver.

Counsel for both parties have not argued the points in their brief but have indulged in a general discussion. Rule 7 of our court provides that the argument shall be confined to the points made in the brief and no others, and a point made but not argued may be considered waived.

We see no convincing reason to reverse the orders appealed from and they are affirmed.

AFFIRMED.

In the control of the c

the many that the state of the first the many many and the

encore via constant produce and constant produce of the second of the se

received in model of like thing the late of la

landicare of the same diameters at gardweete and

c. the at the property of the transfer was exactly bring from the cool
.x. where is the first of the cool of the first
.x. where is the cool of the cool of the cool of the first
.x. the cool of the first of the cool o

The second of the contract of the contract of the second o

rasino po pagina de Ser pio esperantaní

The state of the s

JULES GILMER KORNER, Jr., Appellant,

VS.

MAURICE T. WEINS MIK,
Appellee.

APPEAL FROM CIRCUIT GOURT OF COOK COUNTY.

209 L.A. 625

UR. JUSTICE MCSCRELY DELIVERED THE OPINION OF THE COURT.

January 16, 1936, a judgment was entered, apparently by default, against defendant for 37287.57; may 13, 1936, which was after the term at which judgment was entered, defendant filed a petition asking that the judgment be vacated and set aside; June 26, 1936, the court vacated the judgment and plaintiff appeals from this order.

The controversy is between attorneys. The suit was commenced May 10, 1932; the declaration alleged that plaintiff had performed services as attorney for the defendant and had not been paid for such services. Defendant filed an appearance and a plea, supported by an affidavit, and a demand for a jury trial; in his plea defendant alleged that plaintiff and commenced as associate counsel for defendant and that the defendant had paid him in full for such services.

The record next shows that judgment of January 16, 1936, against defendant entered by William J. Wimbiscus, Judge. May 13th defendant filed the petition asking that the judgment be vacated; notice of the motion was fully served upon the attorneys for plaintiff.

The petition asserted that the cause had been assigned for trial to Judge Daniel P. Trude; that no notice of trial was ever served, as required by the rules of the court; that in December, 1935, petitioner consulted the locket and no notation appeared

·

grand and a desirable

and the second s

Fra relation of the control of the c

The continues in the continues of the co

ins of this less than a larger of the core of a constant than a served, and the constant the constant than a served, as the constant that the constant the constant that the constant the constant that the consta

relating to the calling of the case; that he asked one of his associates to watch this case during January, 1936, in which month petitioner was ill, but that the associate overlooked (he call of the case which appeared in the Chicago Deily Law Bulletin; that he did not learn of the Judgment until May; the petition also restated the defense set forth in his plea.

June 26th the court entered am order Tinding that no notice of trial had ever been served upon defendant as required by the rules of the court; that the case had appeared on the docket of cases assigned to Judge Daniel P. Trude for all the years between 1932 and 1936, and that the cause was never called for trial: that it appeared that defendant was ill and unable to watch his call during January, 1936, at which time this case, with namy hundred other cases was taken from the trial calendars by an executive committee of the court and assigned to a "Special Celemiar to be heard by this Court:" the court thereupon ordered that the default judgment of January 16, 1936, be vacated and set wide and the cause set down for hearing. The defendant had on file a demand for a jury trial. The record of the judgment of January 16th recites that the cause was tried by the court without a jury. In People v. Delnero, 260 Ill. App. 624, we held that the court was without authority to hear the cause without a jury where the defendant had demanded a jury trial. We cited section 5, article 2 of the constitution of 1870 - "The right of trial by jury as heretofore enjoyed, shall remain inviolate .... " 24 Cyc., page 159, says: "Where, however, a party has demanded a jury trial the mere fact that he is absent when his case is reached and called for trial is not a waiver or forfeiture of his right .... " Under these circumstances the court was not authorized to try the cause without a jury, and the absence of the defendant was not a waiver of this right in this respect.

Les transferences of the second secon

est total of the control of the cont

For the control of th

Plaintiff's sole argument is that courts have no power to set aside judgments after the expiration of the term at which mey are rendered. Section 7 of the Civil Practice act subnorizes a court, upon a proper showing, to vacate a judgment after the term at which it was entered. Under the statute defendant and the right to file his petition or motion seeking to have the judgment vacated.

As has been said in many cases, such a motion or petition stands as a declaration in a new suit. If the plaintiff desired to question the sufficiency of the sectition he should have done so by filing a "decurrer, plea of nullo est erratum, by motion to dismiss, by pleading special matters in confession and avoidance, or by making an issue of fact by traversing the allegations. " The People v. Green, 355 Ill. 468, 475. See also harris v. Unicago house Wrecking Co., 314 Ill. 500. This court has followed this rule in The People v. Cardner, 279 Ill. Acc. 451, where we considered the claim that the petition stated no facts sufficient to warrant the court in vacating the judgment under the motion. We held that even if there was an entire lack of sufficient facts alleged in the petition, that dusstlon was not saved for review unless it was raised by one of the methods stated in The People v. Green, supra. We quoted from the Green case: "The petitions filed purported to state such errors in fact. Whether they did state errors sufficient to justify setting aside the judgment is a question of lev, and if the State desired to present that question to this court it should have saved it by raising it in the trial court and securing a ruling thereon. "

first procedure was not rollowed in the case at bar, hence the question of the sufficiency of the petition is not before us. This question not having been raised, the order of the Circuit court is affirmed.

AFFIRMED.

ing the second of the second o

the first transfer to the first transfer to the first transfer tra

A COMPANIA CONTRA CONTR

Light of the contract of the c

THE PARTY OF THE P

k. KOZAK, doing business as ADVANCE WHON COMPANY, Appellee,

Vs.

LERMER SHOPS OF ILLLHOIS, Inc., a Corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT

239 I.A. 6253

MR. JUSTICE MCSURELY DELIVERED THE OPI, IGN OF THE COURT.

Upon trial by the court of an action in trover plaintiff had judgment for \$275, from which defendant appeals.

Plaintiff alleged that defendant wrongfully converted to its own use an electric been sign, which is in the shape of the letter "T" - the top over five fleet across, in height over sixteen feet, with the words, "Club Manhattan, Dinc and Dance", which six transformers.

Earl Burgess was a tenant of the defendant of the second floor at 4038-40 West Madison street, Chicago; derendant's store was on the first floor; hovember 9, 1934, plaintiff sold to him the sign in question, agreeing to install and fix it outside the building, under 9 c n itional sales contract mercin burgess agreed to pay for the sign in monthly installments, the last falling due in harch, 1935.

On or about January 3, 1935, Burgess was in arrears in his rent and abandoned the premises; he was also in default on his payments for the sign; the sign remained fixed to the outside wall of defendant's building until it was removed by defendant either in the latter part of June or in Movember, 1935. Defendant had leased the vacated premises to another tenant and the sign was removed at this time and placed, apparently, in an area way adjacent to defendant's building.

Although plaintiff knew that the sign was affixed to the

to the first all positions .

But the same of th

and the control of

2 9 4.025

and the second of the second o

Note: I have been a compared to the second of the second o

Those of Audio-Construction of the construction of the construction of Audio-Construction of Audio-Construction of the construction of the constru

The send of the se

Africar on Localit brown and a set of the company

front of defendant's building for approximately eleven months he never made any demand upon the defendant for the sign nor claimed ownership of it until November 19, 1935; on this date plaintiff's truck called at defendant's store on West madison street and the driver demanded of the young lady in charge the immediate delivery of the sign; he was referred to defendant's attorney, Myron Wisch. Plaintiff's attorney, David J. Zimring, telephoned to Wisch saying that he had a conditional sales contract and demanded the sign at once; this sales contract was not exhibited to defendant or its attorney until several months after this suit was commenced.

Both Zimring and Wisch, respective attorneys for the parties, testified, and there is direct conflict in their testimony as to what was said. Wisch seems to have suggested that since plaintiff had been so long in making any claim to the sign he might be estopped from asserting ownership, but also suggested that the matter could be settled without litigation and that if Zimring would submit his sales contract and evidence of ownership in the plaintiff, with a brief, this would be forwarded to the nome office in New York City. Defendant has over two thousand stores in the United States, with headquarters in New York City. Zimring refused to accede to Wisch's suggestion, and on the same day, hovember 19th. mailed a letter to delendant at its West Madison street store demanding immediate return of the sign and the transformers; three days thereafter plaintiff instituted this suit. Benjamin Crane, an attorney associated with Wisch, testified that on the day suit was commenced he telephoned to Zimring, saying he had been authorized by defendant's home office to deliver the sign to plaintiff, but Zimring refused to accept this; Grane repeated that they wished to turn over the sign as defendant had no use for it, to which Zimring replied. "Too late now - I don't want it."

The state of the s

njar kaj kulintin u kirintin kiriĝi la libinta li un bita tikaj "ŝi di kaj kirinta jandi".

Note that the state of the stat

renline, Then last to a second of the

Upon the trial defendant's position was that it had a sign in its possession and was willing to give possession of it to the person entitled to it as the court might determine. Defendant's counsel stated that their position was that of an interpleader and that it claimed no interest in the sign.

horeover, while there was evidence to the contrary, there was persuasive testimony by a well qualified witness that the sign had virtually no market value. One of the reasons was that the wording of the sign - "Club Hanhattan, Dine and Dance," limited its desirability to a buyer who would wish a sign with those words, and that there was hardly one chance in a thousand of finding such a buyer.

We are of the opinion that this law suit has been caused by the contentious attitude of the respective attorneys in the case. If plaintiff had exhibited his conditional bill of sale to defendant's attorney and had been content to wait a few days, the sign would have been delivered to plaintiff without litigation. After no demand had been made upon defendant for nearly eleven months it might reasonably ask for time in which to investigate and ascertain whether the demand was made by one lawfully entitled to possession.

We hold that the defendant was not suilty of unlawfully converting the sign and transformers in ouestion, hence the judgment should have been for the defendant.

The judgment is reversed without remanding.

REVERSED.

Matchett, P. J., and O'Connor, J., concur.

with the production and the second contract contract and an extensive feature of the first second contract of the second contract of the

the sentertime and a second of the transmission and the content of the content to the content to

in a fine de la composition del composition de la composition de la composition de la composition de la composition de l

A section of the sectio

39368

EDWARD E. PLATH, Executor under the Last Will and Testament of Ida Plath, Deceased,

Plaintiff.

VS.

EDWARD G. DeLAUNTY et al., Defendants.

RIGHARD M. O'BRIEN, Receiver, Petitioner-Appellee,

VS.

RUTH HOFFMAN (Impleaded with, etc.), Respondent-Appellant.

68

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

289 I.A. 625

ER. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COUNT.

Richard M. O'Brien, receiver in a foreclosure proceeding, filed a petition asking the court to order cancelled a lease of one of the apartments in the premises made by real estate agents to respondent Ruth Hoffman, presenting, among other reasons, that the lease ran beyond the statutory period of redemption; answers were filed and upon hearing the court held that the lease was void and ordered respondent and persons holding possession under her to vacate the premises; it was also ordered that moneys she had paid for rent and sums expended for moving expenses should be paid her; she appeals from this order.

may 31, 1935, 6 'Brien was appointed receiver in a proceeding to foreclose a trust deed "during the pendency of the foreclosure suit and the period of redemption"; he was also authorized to
manage and control the premises, "subject to the orders of this
court." The premises have been sold under a foreclosure decree
and the period of redemption expired February 27, 1937.

In October, 1936, a written lease was executed by the respondent and the real estate agents of an apartment in the

višim na primavili, Darki. Ivišim. , valovina vijik, rišimu pa iliživiami. Vrijikas

. 117

of the following the first the first of the south of the south

Rio and it, whiches to althe entries and the action of action of the control of a contribution of the cont

con the colored of the contract of the color of the color

In October, 1936, a written Land was lactured by the respondent and the real satures, eats of a lactured to the real satures of a lactured by the real satures of the lactures of the lactures

building for a term expiring september 30, 1937; the receiver did not sign this lease and no order of court was obtained authorizing it; October 16th the receiver filed his petition also wing the lease and the authority of the real estate agents who signed it; October 27th his amended petition was filed, in which he stated that he had not ratified or affirmed the lease, as it was made for a period of time extending beyond the expiration of the period of redemption; it was also alleged that the lease was obtained through misrepresentation and fraud.

Counsel for the receiver in this court suggest that as the period of redemption expired February 27, 1937, the questions presented on this appeal are merely most questions. Respondent, however, argues that the receiver had authority to make a lease beyond the period of redemption.

The opinion in Chicago Land Bank v. ReCambridge, 343 Ill.

456, disposes of this contention. In that case the trial court had authorized the lessee to enjoy the property for a period of four months after the master's deed issued. The Supreme court held that the court had no authority to make such a lease; that when the period of redamption had expired and the property was conveyed to the purchaser the jurisdiction of the court was exhausted. In Chicago Deposit Valle of v. abult, 155 for 554, bil, the receiver made a lease for a term which extended beyond the period of redemption; it was held that persons dealing with receivers do so at their peril and are bound to take notice of their incapacity to conclude a binding contract without the sanction of the court.

Weeks et al. v. Weeks, 106 E. Y. 626, was an action for partition, and a receiver <u>periodete lite</u> ass appointed; the case with the receiver was in court several years. It was held that the duration

the section of the section of the common of the common end of the common of the common

poriod of reactivities created and state of the last state of the

The content of the co

est to the second of the end of the control of the second of the second

of the litigation was uncertain and under the peculiar circumstances the court might authorize a lease extending beyond the litigation; but the court also said that ordinarily a lease which might extend beyond the termination of the litigation would be unjustifiable.

We find no opinion applicable to a simple case of foreclosure which holds that a receiver may make a valid lease extending beyond the period of redemption.

For the reasons indicated the order appealed from is affirmed.

AFFIRMED.

Eatchett, P. J., and O'Connor, J., concur.

Annual and on the control of the con

Let us the result of the result of the Landau states of the result of th

, to milita

with the group of the control of the section

Candida k. wax la. Appellee,

1. .

ARCOLE CONSTRUCTION COMPANY, a Corporation, and J. A. Illam. aub, Appellents.

67

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

289 I.A. 526

MR. JUSTICE O'COMNOR DELIVERED THE OPINION OF THE COURT.

Charles K. Buckels brought suit against the Arcole Construction Company, a corporation, and Jack Fitzgerald to recover damages for personal injuries claimed to have been sustained by him through being struck and injured by one of the Construction company's automobiles driven by defendant Fitzgerald. There was a jury trial and a verdict in plaintiff's fever against both defendants for \$20,000, which was later set aside and a new trial awarded. Afterward the case was retried and there was a verdict against both defendants for \$10,000. The court rejulied a remittitur of \$3000. Judgment was entered on the verdict against defendants for \$7000 and they appeal.

April 21, 1935, plaintiff, a man about 26 years of age, was driving a Plymouth automobile south in the west lane of Skokie boulevard, about one-half wile north of Willow Road. His three sisters and another young ledy were in the car with him. At this point he had a flat tire on the rear left wheel and drove his car so that the right wheels were on the shoulder, the left remaining on the pavement so that he could change the tire. He got out, jacked up the wheel, exchanged tires, which took about 20 minutes, and as he was finishing his work was struck and severely injured by a theorolet automobile belouging to defendant Construction company which was being driven south by its agent, defendant ritzgerald.

Skokie boulevard for some distance in the vicinity of the

gist som på kirkuret.

.

## a some bus, and fine and a some of the som

and the second of the second o

Let get a server the server of the server of

Entropy of the property of the

In applicable with the series with the second transfer of the con-

accident, is a straight, level road with a pavement 40 feet wide, having four traffic lanes, two for northbound and two for southbound traffic.

The place in question is in the country; there were no buildings or lights in the vicinity; it was somewhat dark at the time. Plaintiff and the left rear fender of his car were struck; plaintiff was thrown a considerable distance.

Fitzgerald testified that he was a watchman for the Construction company, and on the evening in question had been plucing caution lights for some distance along the boulevard "where bridges were out to keep traific out of them"; that he was traveling south about 30 miles an hour on the right or outer lane: that there was considerable traffic at the time; that the lights on the northbound automobiles were rather blinding; that he did not see plaintiff or his automobile until just about the time plaintiff was struck; that he did not strike plaintiff's car; that he went about 100 feet south of plaintiff's car and then turned back, and he and another man who was passing in an automobile and who had stopped, picked plaintiff up, put him in defendant's car and drove to the police station on the way to the hospital in Evanston; that a policeman at the station said, "Why, he is drunk." Witness deried this and said he had not been drinking except that he had some beer between two and four o'clock, - that he was not intoxicated; that the lights on his automobile were lighted as he was driving south on the boulevard.

Other witnesses who were in plaintiff's car testified that Fitzgerald was traveling from 35 to 45 miles an hour.

Plaintiff testified that his head lights and the tail light were burning prior to and at the time of the accident. The weather was clear and the pavement dry. Some of the witnesses testified that the shoulder, which was about 9 feet wide at the place in question, was soft, while other said it was solid or firm.

go de la composition La composition de la La composition de la

The second of the seco

And the street was fitting that with the out on concentration of the bilinear the second of the second of the bilinear the second of t

For the late of the second sec

Plaintiff remained at the hospital five days, during all of which time he was in severe pain; he was treated by two physicians; after he left the Evanston hospital he was taken to the Jackson Park hospital and placed under the care of another physician; he remained at that hospital about three weeks, during all of which time he was in pain; he was taken home from the hospital and was there confined to his bed for the next two months, after which he got around on crutches for about a month, and after that used a came for three or four weeks; he had dizzy spells and severe headaches, and at the time of the trial, June 1, 1936, more than a year after the accident, he was still under the doctor's care. He testified that "It was just turning dark when I stooped. It was dark when the accident happened."

A number of X-ray pictures are in the record. Dr. Christopher testified that on the evening of the accident he examined plaintiff at the Evanston hospital when X-rays were taken; that he found a fracture of the "head of the tibia" involving the spine of the tibia, a minor fracture of the sacrum and a minor fracture of the ilium; that he found bruises and abrasions and that plaintiff was in considerable pain; that they put a plaster cast on the right leg.

Dr. Cox testified that he treated plaintiff at the Jackson Park hospital and had continued to treat him to the date of the trial; that he found a "linear fracture of the right side of the sacrum, \*\*\* a fracture of the tibia; that four bones in plaine tiff's body were fractured; that he found lacerations and contusions and other injuries; that he placed a plaster cast around plaintiff's waist and down his right leg 6 inches below the knee, and that the injuries were permanent.

Defendants contend that plaintiff was guilty of contributory

en en la composition de la composition La composition de la La composition de la

The state of the s

Pr. Cor lessed in a land of the control of the cont

negligence as a matter of law, and that the court should have directed a verdict in their favor as requested; that in any event, the finding of the jury that plaintiff was in the exercise of due care and caution for his own safety is against the manifest weight of the evidence. A number of cases are cited to the point that plaintiff was guilty of contributory negligence as a matter of law.

In Loutnam v. Chicago City Ry. Co., 198 Ill. App. 329, we said (p. 333): "As a general proposition, the question of contributory negligence is one of fact for the jury, and only becomes one of law when the evidence clearly establishes that the accident resulted from the negligence of the injured party. If there be any difference of opinion on the question, so that reasonable minds may not arrive at the same conclusion, then it is a question of fact for the jury. Bale v. Chicago Junction Ry. Co., 259 Ill. 476."

In Melly v. Chicago City Ry. Co., 283 Ill. 640, the court said (p. 645): "As a general proposition, the question of contributory negligence is one of fact for the jury under all the facts and circumstances shown by the evidence, (Pale v. Union 6 Junction Railway Co., 259 Ill. 475) but cases occasionally arise in which a person is so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant."

In the instant case the evidence is to the effect that the accident occurred about 7:30 p. m.; that although it was dark at the time the night was clear, and one of the witnesses called by defendants testified he was driving south in the boulevard at the time in question and that he first saw plaintiff's car (which was after the accident) "when I was about a mile away. The weather was clear and the night ay straight." The paved realway was 40 feet lide ith

the simple term is a second of the second of

Little to all a land, and the control of the contro

ections of the case of the control of the control of the case of t

four lanes for traffic; the road was straight and the country level.

There is further evidence that plaintiff's rear light was burning at the time, although there is some evidence from which it might be inferred that the light was obscured by the damaged automobile tire which was leaning against the car. When plaintiff found he had a flat tire he pulled to the right so that the two right wheels were on the shoulder. The evidence is in dispute as to whether the shoulder was solid. Plaintiff testified that he did not pull entirely off the pavement because he could not well use the jack to lift the wheel unless it was on the pavement.

The jury saw and heard the witnesses and was in a much better position (as was the trial Judge) to determine the truth of the matter in controversy than we are, in a court of review where we have but the printed page before us. The jury found in favor of the plaintiff, its finding was approved by the trial Judge, and we are of opinion that althou, a the caestion of limbility is exceedingly close, yet we think the question of whether the conduct of plaintiff at the time in question was "so violative of all rational standards of conduct" applicable to persons in similar circumstances, was for the jury; and we are also unable to say that the finding is against the manifest weight of the evidence.

Counsel for defendants further contend that on the trial of the case counsel for plaintiff made statements in his argument to the jury which were so improper, prejudicial and inflammatory as to require a reversal of the judgment, and although counsel for defendants say that most of their objections to such argument were sustained, yet this did not cure the error. It is also contended that plaintiff's counsel in his argument claimed that plaintiff had sustained certain injuries, of which there is no evidence, and that the judgment is excessive.

We have considered all of the contentions, and while we are

A CONTROL OF THE STATE OF THE S

Estima vosi don presenta de la completa del completa del completa de la completa

cae case evaluation of a solution of a solution of a solution of a solution of a cae as solution of a cae as solution of a solut

unable to approve of all that was said and done by counsel for plaintiff, yet we are of opinion that we would not be warrented in disturbing the judgment.

Upon a consideration of the entire record we are of opinion that defendants have had a fair trial and that the judgment is not excessive.

the judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

Leading the control of the control of

A section of the control of the contro

and the second of the second o

Landenski, in the care attention to a statemental

10

CATHERING SCHULTZ, Plointing - 1 11011,

VE.

THE LIVE STOCK NATIONAL BANK OF CHICAGO, Administrator of the Estate of Max Grabo, Deceased, Defendant-Appellee. APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

209 I.A. 626

ER. JUSTICE C'CORNOR DELIVERED THE OPINION OF THE COURT.

Catherine Schultz brought suit against wan Grabo to recover compensation for injuries which she claimed to have sustained in an automobile collision, as a result of Grabo's negligence. There was a verdict and judgment in defendant's favor. Plaintiff prosecuted an appeal to this court. Afterward Grabo died and the Live Stock National Bank of Chicago, as administrator of his estate, was substituted. The judgment was reversed and the cause remanded for erronsous instructions given at defendant's request. Schultz v.

Live Stock National Bank of Chicago, 278 Ill. App. 623 (abst.)

Afterward there was another trial and again the jury found defendant not guilty, and plaintiff prosecutes this appeal.

of December 27, 1931, as it was getting dark, plaintiff was riding as a passenger-guest in an automobile driven by Fred Brei west in Dempster street, and as they were crossing Waukegan road, a north and south street, there was a collision between the Brei car and an automobile driven by Grabo east in Dempster road as it turned to go north in Waukegan road. Brei's family was in the automobile with him, one of the children beside him on the front seat, his wife in the seat immediately behind him with their baby on her lap, and plaintiff opposite her - on the righthand side of the rear seat. There were "stop and go" lights at the intersection operated by a policeman stationed at the normeast corner of the intersection.

08/2/03



and the second of the second o

A PROPERTY OF THE CONTRACT OF

of second or every to an indicate the control of th

The evidence is to the effect that as Brei was some distance east of Wankegan road the lights changed to green, so that he continued across Waukegar road at about 25 miles an hour. There were four lanes of traific in Demoster street: Brei was Ariving west in the second lane from the north: Grabo's car was coming east in the second lane from the south at a moderate speed. He turned his car to go north in Waukegan road at or near the west side of Waukegan road, and when it looked as though there would be a collision, Brei turned his car to the last or south an, the right sides of the two cars brashed or aldeswiped each other; Grabo's car just prior to the collision was traveling at a "moderate speed, very slow at the time. " The two cars stopped at once end all the persons, including plaintiff, jot out of the cars. The cars were then moved to the northwest corner of the intersection; plaintiff claimed she was injured, and she then took the names of some persons: afterward the two cars were driven away. Plaintiff refused to ride farther in the Frei car and went away in the car of another person.

Max Grabo having died prior to the second trial of the case, plaintiff was disqualified under the statute, so we do not have her version of the natter.

Andrew A. Gour, called by plaintiff, testified that he was a graduate of an esteopathic college in Chicago and licensed to practice esteopathy in Illinois in 1908, during which time he had practiced in Chicago; that he had known plaintiff about six years; that he first treated her on December 23, 1931, the day after the accident; that he found "a lumbar and hip condition. There was a bruise and a little swelling in the lumbar and slightly in the right hip, and the rest of the spine was very tense, so it was hard to treat: "that plaintiff told him of the automobile accident and he treated

nuir die de neu de nation de nation de nationale de natio

e professional participation and a strategic

A CONTROL OF A CON

her about a north and a half; that he found the "right hip slipped up in the back, the fifth lumbar rotated to the right and the second to the left;" that he gave her 21 treatments. On cross examination he testified he knew plaintiff about two years before the accident; that when he first knew her she was perfectly normal; that a year or so before the accident he saw her at his lectures; that he never examined her before December, 1931. Some of the testimony he gave on the former trial is in the record and what purports to be his office memorandum which indicates he first treated her on January 8, 1932.

The evidence further shows that no one was injured in the collision except plaintiff.

Dr. Warren, a practicing physician and surgeon, testified he first saw plaintiff February 19, 1932, and made a complete examination of her; she complained of severe pains in the lower back just above the hip, dizzy headaches, that she found great difficulty in rising from a sitting or reclining posture; that his examination revealed epasticity of the lumbar muscles in the lower back; that she was "markedly dizzy;" that in his examination he used a fluoroscope and there were X-ray pictures of plaintiff. A number of those are in the record. He testified that the last time he treated her was the latter part of 1933; that he made another examination in 1935, and that when he first examined plaintiff the conditions he found "were the result of recent trauma."

Dr. Zeitlin, called by plaintiff, testified among other things, that he was a physician specializing in X-rays. A number of X-ray pictures were then shown him and he testified at considerable length and on re-cross examination said: "From the type of scoliosis I find in this film, my opinion is that it cannot be traumatic." He further testified that he knew nothing about plaintiff and that his information has besed in the x-ray officures.

A CALL OF THE RESERVE OF THE CALL OF THE C

, this is it desert meisifico

And the property of the control of t

Time of a state of a s

There is further evidence in the record as to plaintiff's physical condition, some of which is to the effect that she was suffering from some of the same allments for a considerable time prior to the accident; while on the other side, there was evidence that her wealth was good prior to the accident.

Counsel for plaintiff says the verdict is against the manifest weight of the evidence; that the evidence is "all one way" - that the cause of the collision was the neglitence of Grabo. And after discussing the evidence he says, "Why did the jury bring in such a verdict in the face of this evidence? Was it because there was no evidence of injury to the plaintiff? The answer to this question is equally obvious from an examination of the record."

The evidence is to the effect that Brei was traveling at about 25 miles an hour across Waukegan road and that Grabo was coming east very slowly when he threed toward the north. The as police officer testified that Brei's car approached the Grabo car it slowed up and "when they came together it was just a brushing of the cars."

We think the question whether Brei or Grabo or both were to blame was for the jury. Whether the jury based its verdict on this question or whether it found that plaintiff was not injured, obviously we are unable to say. The case has been tried twice and two juries have found for the defendant. We feel we would not be warranted in disturbing the verdict, which has been approved by the trial Judge. We are also of opinion that the court should not have given, at defendant's request, the instruction complained of by counsel for plaintiff. By that instruction the jury was told that plaintiff was not relieved from the duty of exercising due care for her own safety because she was an invited guest, riding in the automobile, but was bound to exercise ordinary care and caution for her own safety, and that if the jury believed from the evidence that

A representation of the form of the second o

The particular of the product of the product of the product of the particle of

equation of the control of the contr

plaintiff did not exercise such care, "or that she failed to use her senses and faculties to warn the driver of the automobile in which she was riding of approaching danger, and that her failure so to do under all the circumstances and conditions in evidence was negligence on her part which caused or proximately contributed to her injury, if you find she was injured, then the plaintiff cannot recover and you should find the defendant not guilty."

While it was plaintiff's duty to exercise due care and caution for her own safety, there was no evidence that she did not exercise such care. As stated in the opinion rendered in this case on the former appeal, "The only time that a passenger would be required to give a warning would be when he saw some danger which the driver did not see. If the driver sees an approaching automobile, and is watching it, then no warning is necessary."

We went into this question fully in hagen v. Bailus, 283 Ill. App. 249. While this instruction was erroneous and directed a verdict, we think the error was not such, in view of all the evidence in the case, as would warrant a reversal. The facts were not complicated but few and simple and easily understood. We think the instruction did not mislead the jury.

The judgment of the Superior court of Cook county is affirmed.

JUDGERNT AFFIRESD.

Latchett, P. J., and LoSarely, J., concur.

The state of the s

The first of the control of the cont

, com (1)

NEWMAN-RUDOLPH LITHOGRAPHING COLPANY, a Corporation, Appellant.

VS.

SHEPARD & LAWRENCE, INC., and CHILD DEVELOPMENT FOUNDATION, INC., a Corporation, Appellees. 71

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

239 I.A. 6263

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendants to recover 1050, with interest thereon at 5 per annum from October 8, 1932. At the close of plaintiff's evidence there was a finding and judgment in defendants' favor and plaintiff appeals.

The record discloses that on October 8th and 10th, 1932, plaintiff entered into a written contract with Shepard & Lawrence, Inc., (hereinafter called the defendant) whereby plaintiff was to print and manufacture 15,000, 8-volume sets of books known as "Book Trails" for \$10,500, and as part of the consideration plaintiff agreed to buy stock in the defendant company for 10% of the contract price at \$10 a share. On October 8th plaintiff paid defendant \$1050 for which it received 105 shares of defendant's stock, and plaintiff contends that afterware the shift bevelopment Foundation, Inc., purchased all the assets of Shepard & Lawrence, Inc., and agreed to pay all of its liabilities.

Plaintii'i contends that under the written contract of October 8, 1932, the defendant Shepard & Lawrence, Inc., was to theresiter notify of intial to proceed when the manufacture of the books; that no such order was given, and plaintii' after waiting a reasonable time tendered back the stock and demanded the \$1050.

Plaintiff offered evidence to the effect that on October 8, 1932, it was given a written order for the books by Shepard & Law-

udzi ili ili 12 1 nCie sed<del>e</del>nd ieliz <sub>A</sub>du ili sede

12.37

on ready as our wife, income, as a constant of the constant of

A.C. P. Francisco Co.



The property leads of the contract of the cont

Tisintisi contes a mas uncert of the product of the

en trunca, so de l'especte est est est est est its littable l'a mant l'energie production de la company de la comp

rence. Inc., and two days later a written supplement or memorandum of the order. These two documents are in evidence. The order of October 8 provides that plaintiff is to deliver the books when manufactured to Shepard & Lawrence, "as per later instructions." There is also in the record a contract entered into between Shepard & Lawrence, Inc., with Warren T. Davis, dated December 18. 1933. which contract was assigned by Davis to defendant Child Development Boundation, Inc. It recites that Saepard & Lawrence, Inc., is engaged in the publication and sale of a set of books known as "Book Trails" and that all its property, which it is selling to Davis, is free from incumbrances and liens, "except possible claims of creditors for current and contingent liabilities." The contract further provides that Davis is to organize a corporation with a capital of \$150,000, and that Sheoard & Lawrence. Inc.. agrees to subscribe for an amount of referred stock in the company equivalent to the present paid-in conitalization of Shepard tlawrence, Inc.: that Shepard & Lawrence, Inc., was to turn over to Davis all its property, including all of its accounts receivable. title to plates and paintings, art work, and copyrights of "Book Trails", etc. The buyer agrees to collect the accounts, deduct 15% as a collection fee, pay any legal claims which may arise against the receipts and \$1000 a month to Seller until \$10.000 has been turned over for the payment of Seller's current liabilities;" that additional sums are to be deposited with the Korthern Trust Co., "as a special reserve fund for the payment of Seller's continent liabilities and the cost including attermys' less, for settling the same or defending any suit that may be bround against the belier to establish the same."

At the close of plaintiff's evidence the court, on its own motion, held that plaintiff had not made out a case and entered

and said as common our section of the desired and state of the said of the sai

judgment accordingly. In rendering his decision the court said, "There is nothing in this case. You haven't shown anything. You have got an ambiguous contract, no time fixed, indefinite. You kept the stock. What you should have done, if you had any claim against this corporation, it was your business within a reasonable time to insist that they give you this order, and on their failure to live you the you should have demanded back your money.

\*\*\* You have slept on your rights. Now you come in on a contract that is indefinite absolutely and in a measure ambiguous, and contend that you are entitled to your money back, when as a matter of fact you never demanded that they should give you this order."

The order or contract of October 8th expressly provides that plaintiff was to proceed with the manufacture of the books when defendant gave it orders to do so. The contract provides that plaintiff was to manufacture the books "as per later instructions" (which were to be given by Shepard & Lawrence, Inc.), and no time boing mentioned, the law presumes a reasonable time thereafter.

Plaintiff in its complaint alleged that it was at all times ready, able and willing to manufacture the books when so ordered by Shepard & Lawrence, but that Shepard & Lawrence "refused to give to plaintiff the later instructions required by said order."

Shepard & Lawrence, Inc., in its answer admitted the making of the contract, the payment of the \$1050 to it by plaintiff for the 105 shares of stock, but denied that plaintiff was ready, able and willing to manufacture and deliver the books for the price named in the contract, but alleged that on the contrary plaintiff told it prior to starting the suit that it would not manufacture the books for the price set forth in the contract; that at the time of the execution of the contract of October 8th and loth, plaintiff was advised that before the 5th edition of the books (which was the edition mentioned in the contract) could be printed or required by

The first content of the content of

ANDERS OF BOTHER PORCES OF A STATE OF THE TO THE ROLL OF MORE STATES OF THE STATES OF

The color of the c

Shepard & Lawrence it would be necessary for Shepard & Lawrence to sell the belance of the 4th edition of the books and therefore it might be "many months before the defendant would require and need and therefore give instructions for printing any part or portion of the fifth edition," and that at the time plaintiff teld defendant it would not print and deliver the books at the price nemed in the contract, defendant told plaintiff it had an adequate supply of the 4th edition to take care of the demand for the books. Defendant further alleged that the Child Development Foundation, Inc., did not purchase all of the assets of Shepard & Lawrence and did not agree to pay the liabilities of Shepard & Lawrence, Inc.

Where a contract fixes no time within which the work is to be done the law will imply a reasonable time, and what is a reasonable time depends upon the circumstances of the particular case.

In re Hellams, 223 Fed. 460; Williston on Sales, 2nd ed., sec. 457; Hamilton v. Scully, 118 Ill. 192.

Since the contract of October 8th did not specify the time within which plaintiff was to manufacture the books (but was to do so when later requested by Shepard & Lawrence) the law will presume (Shepard & Rawrence having given no such instructions) that they should have been given within a reasonable time; that Shepard & Lawrence, Inc., construed the contract as requiring it to give plaintiff instructions when to proceed with the work is shown by its answer, from which we have above quoted, because it alleges that it had a part of the 4th edition on hand and would not require the manufacture of the 5th edition by plaintiff, and therefore would not require and need to give plaintiff instructions until it needed the 5th edition.

In the instant case the contract for the books is dated October 6, 1932; the suit was begun August 11, 1934; the case was tried October 6, 1936. Since only plaintiff's evidence is in the

The section of the contract of the contract of the section of the section of the contract of t

picture of the control of the contro

in set inches a commissed for the end in the construction of the end inches and decorate in the end of the construction of the end o

record, we are of opinion that Shepard & Lawrence did not give plaintiff instructions to commence the manufacture of the books within a reasonable time. We are also of opinion that plaintiff, by tendering back the stock certificate for the 105 shares of stock, was entitled to have the \$1050 returned, and it was not necessary, under the facts disclosed by the evidence, for plaintiff to have made a demand before bringing suit. It is obvious that the demand would have been unavailing, and the law never requires the doing of a useless set. Lat. Lond - Investment Co. v. Zakos, 230 Ill. app. 503; Granz v. Aroger, 22 Ill. 74; Ace & Chapell Co. v. Penn. Co., 291 Ill. 24. Plaintiff made a prima facie case against both defendants, and the judgment of the Superior court of Cook county is reversed and the cause remanded.

Matchett, P. J., and AcSurely, J., concur.



proper judgment. The attorney for appellant afterwards wrote a letter to the clerk of the Circuit Court in which he related the conversation above mentioned, stated that he agreed with the attorney for appellee that there was no sufficient judgment, etc., and that the clerk might show his letter to the judge. Attorney for appellant did not appear in court on January 15th, 1935, and upon the case being called the trial court dismissed the case for want of prosectuion. No appeal was taken therefrom and no action of any kind at the term at which it was entered, nor the following March Term, but in the May Term, 1935, appellant appeared with a different lawyer and filed his motion to set aside the order of dismissal. The Court denied this motion, as above stated.

This appeal challenges the right of the trial court to dismiss the cause in the first instance. In Hague vs.

Eing et al 845 Ill. App., speaking through ir. Justice Higbee, we held that "An appeal from a judgment of a justice of the peace which simply amounted to a finding gives the County Court no jurisdiction and it should sustain a motion to dismiss the case." What the court can do on motion of a party it can do on its own motion. It must necessarilly be so; also when cases get onto court dockets, although it is apparent on their faces that the court has no jurisdiction to hear them, they must remain there forever because the court is powerless to dismiss them.

In addition to the nower of the court to dismiss for want of jurisdiction in this case, the court had a virtual agreement of the parties that the case should be dismissed.

The dismissal by the court was a final appealable order from which Appellant did not appeal, instead he waited three terms and made the motion to reinstate the denial of which he now complains about. Le are of the opinion that



no proper diligence was shown in prosecuting this matter died, would entitle Appellant to the right to have a motion to reinstate the cause allowed even were it otherwise meritorious. In our judgment the trial court properly denied this motion and its judgment in that regard is hereby affirmed.

JUDGITHT AFFIRED.

Not to la published in Earle



STATE OF IL INCIC APPLILATE COURT FOURTH DISTRICT

OCTUBER TERM, A. D. 1936.

Term No. 20

Agenda No. 22

MARY C. GASS MUELLER, Petitioner-Appellee,

VS.

EDWARD J. CRUSL, Appellant.

APPLAI FROM THE COUNTY COURT, ST. CLAIR COUNTY, LAIRCLE.

289 I.A. 627

Murphy, J:

In 1928 appellant received a deed to a tract of land consisting of 40 agres located in St. Clair County. Subsequently two deeds claimed to be suprious were riled of record and in 1900 appellant filed a bill to remove them as clouds on his title. Appellee was not named as a part, in either deed but was made a party defendant to absellant's suit and appeared and filed an answer and crosslill claiming to be the owner of the land. While this suit was pending the Department of Public Works and Luildings Tiled a metition in the County Court to condeam a right of way for a state road across the land in question. Appellant and appelled were made actendants to the emient domain proceeding and by reason of the dispute as to ownership of the land and the litigation pending, the damages that were awarded were ordered paid into the County Treasure, Subsequent to the deposit of the fund withe County Pressure the suit to guit title proceeded to a final decree. In September o, 1900 a decree



was entered dismissing appeller's crossbill and decreed the title to the 40 acre tract and other land to be in appellant. Appellee filed a notice of appeal to the Supreme Court, furnished proof of service of notice, and filed a bond so that the appeal would act as a supersodas. December 30, 1535 while the appeal was pending and before the record had been filed in the Supreme Court, parties agreed on a settlement and encouted a release under seal. No reference was made in the release agreement to the money on deposit with the County Treasurer. Subsequent to the enceution of the release, appellee petitioned the County Court to pay the condemnation fund to her. Appellant claimed it and the County Court entered an order directing the money to be paid to Appellee. This appeal is from that order.

The question raised on this appeal makes it necessary to consider the release agreement and to determine whether or not that agreement included the dispute between the parties over the fund then on deposit with the treasurer.

The release after giving the names of the parties and their respective residences, recites that "Thereas there had been divers dealings and transactions between the said Haward J. Cruse, Eleanor Cruse, his wife, and Mary C. Gass Mueller, with reference to their business and otherwise and cortain disputes and differences have arisen between them. The second paragraph recites that the parties "Have agreed to settle all of the said disputes and differences now existing tetween them by the payment of the sum of \$5,000. by the said Mary C. Gass Mueller to the said Ldward J. Gruse and Eleanor Gruse, his wife, and by the execution of mutual releases in the manner hereinafter set forth." The release then provides that in consideration of \$\phi 0.000\$, the receipt of which is acknowledged: "Each of the parties hereto does herely release the other, his



or her heirs, executors, administrators and assigns from all debts, accounts, claims, demands, demares, actions, causes of action, suits and controversies, of any kind or nature whatsoever, for or by reason of any matter, cause or thing from the beginning of the world up to the date hereof, and particularly all suits now pending in any of the courts of at. Clair County, Illinois, or the City of St. Louis, Missouri, wherein the parties hereto, or any of them, are parties plaintiff or defendant, and which involve matters in controversy between the parties hereto or any of them." The further provision was that each party was to pay their our attorner fee, that all suits should be dishissed including appellee's appeal to the Supreme Court and that appellant and his wife should convey by quitelaim deed all their title and interest in all land involved in the litigation to appeliee. A supplemental release was unawn excepting certain specified items of personal property which were then in the position of appeliee but which were to be delivered to appellant.

If the title to property condemned is in litigation in a pending chancery suit it is proper to order the honey paid into the hands of the county treasurer to abide the result of the chancery suit. Eddleman vs. Union County Transaction Co. 217 Ill. 409. If the property is taken for public use the compensation money is deemed a substitute for the property taken. City of Chicago vs. Cage 268 Ill. 232.

It is evident that when the money awarded in the condemnation suit was paid to the county treasurer there was sharp dispute between appellant and appellee as to its ownership.

It must be assumed that the words in the release, "Certain



Term No. 20

disputes and differences have arisen between them were used by the parties as intending to include the dispute over this fund. It would follow that in the second recital where they agreed to settle all of the said disputes and differences that it was intended to include the dispute over this rand. In the release they agreed to include all delts, accounts, claims, demands, damages, actions, cruses of actions, saits and controversies, of any kind or nature whatsoever, for or by reason of any matter, cause or thing from the beginning of the world up to the date hereof. In consideration of this settlement appellee was to pay \$5,000. to appellant and to receive from appellant a deed for his interest in the property involved in litigation.

Appellant contends that where general language purporting to release all claims is used and included in the release are certain specified items, that the release shall be construed as limited to the specific items only.

In Cram vs. Sawyer 132 Ill. 440, 404 the court said:
"Here the general and comprehensive expression comes first.

It is that the party of the first part does 'release...all right and interest of every kind and nature whatsoever, and especially his contingent right of dower and homestead,' etc., in the lands of his wife. The larger and more general intent is first etcted...An intent thus expressed will not be defeated or limited by subsequent expressions more restricted in their application." The same rule was followed in Chicago Union Traction Co. vs. O'Connell 224 Ill. 428; Brunarge vs. Gottschalk, 305 Ill. App. 260.

It is our conclusion that the trial court correctly construed the release as including the adjustment of the dispute between the parties as to this deposit fund and that it was intended that appelled should have all the property including the deposit in question upon the payment of \$\$\phi\_000\_0\$.

The juarment is affirmed.

Judgment Affirmed.

Not to be published in such



BITTLE OF TELLEST ! APPLILATE COURT FOJETH PILITICA 2 20 mm. 1956.

Term Ho. 35

Agenca No. 23

THE CITY OF LIDURARG. a Sumicipal Corporation, et al., appellees,

vs.

XIII. o all, a compar thon, Appellant.

APPIAL TRIM THE CLECKET COUNT OF SALIAR COLLY, Idalianis.

289 J.A. 62

Murphy, J:

The City of Eldgrade and 54 other plaintiffs filed a suit in the Carcuit Court of Caline County against the Eleorado aster Company. A temporary insunction was issueed enjoining the defendent from discontinuing water to any consumer and ordering water service recatabilities to all considers wherein their source of supply has been indiscriminstely discontinued. The action was based on a violation of contract, impurity of water, and failure to observe the rulings of the Commerce Commission. Answer was filed with a motion to discolve the temporary injunction. Affadavits were filed in support of the motion. On August 12, 1923 the motion to dissolve was denied as to the City of Bidorads, Ildoreco School Listrict No. of and P. b. Fierce col., business with Flaoredo Hospital and as to all other plaintifis the temporary injunction was discolved for went of equity. Seven days thereafter a supplementary decree was entered and was stated to be for the purpose of charifying the decree of sugast 13. In august 12, 1935 defendant filed



Term No. 40

FOR DESIGN LOW OVE

sugar stion of dank re.

The unties come on for a final hearing upon evidence and on December 3, 1900 a final accree was entered finding that the water furnished prior to the temporary injunction wer not reasonably pure and was untit for general use, that the defendant threstoned to discontinue the water to users not paying in full prior to the issuance of the temporary srit, that the temporary injunction was properly issued, that the delement has constructed they liltration plant, that the water is now of good quality and that the rounds for injunction have seen removed, that no disages and accrued to the defendant and that therefore no evidence was heard on the suggestion of damages, ordered that the temporary injunction and modification thereof be dissolved and that The defendent may not shut off water service to deline ment users because they old for any water furnished between Bovember 1, 1914 and August ol, 1708. Perendent appealed from that decree and asks this court to reverse the trial court, dissolve the injunction and remand the case only for the purpose of a hearing to as ess ceremant's and, es. Appelleds have not filed ony brief and under the profiled of this court where an appellac does not appear and like a brief the decree is reversed pro form.

The order of this court will be that the decree of the lower court is reversed and the cause remanded with directions to dissolve the temporary injunction and modifications thereof as to all plaintiffs and that the injunction shall not be continued against the detendant as to any delinquent customers who used water between lovember 1, 1934, and August 31, 1935 and who have not been paid for same, and that the court may near and determine desendant's right to demance and the amount thereof.

heverse remanded with directions.

not to be published in full









Date	Nan Man	ne Palli	
9-8-80	Tom Of	(OMP	641-31
6/1/18/	of Mu	1 grim	227 2
289		717	28
,		/ / /	

